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Supreme Court of the United States

October Term, 1959

No. 220

WILLIAM O'DWYER and SLOAN O'DWYER,
Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable the Chief Justice of the United States and Associated Justices of the Supreme Court of the United States.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered April 21, 1959, which affirmed a decision of the Tax Court of the United States of November 21, 1957, that had determined deficiencies in the payment of income taxes of petitioners for the years 1949, 1950 and 1951, during which years the petitioners had filed joint returns as husband and wife.

Opinions Below

The opinion of the Court of Appeals for the Fourth Circuit is reported at 266 F. 2d 575 and is printed in the appendix to this petition at pp. 35-56. The opinion of the Tax Court is reported at 28 T. C. 698 and reproduced at page 7a of petitioner's appendix below, copies of which are filed herewith.

Jurisdiction

The jurisdiction of the Court is based on 28 U. S. C. 1254(1). Judgment below was entered April 21, 1959.

Questions Presented

1. Whether a gift made as a political or campaign contribution to a taxpayer running for office may, nevertheless, be taxed as income, on the theory that it is the duty of the taxpayer to furnish proof that it was used for that purpose.

2. Whether the Tax Court's refusal to enforce a taxpayer's subpoena calling for the production of the record on which the determination of the Commissioner of Internal Revenue was based, deprived Petitioners of a fair hearing under the due process clause of the Constitution in view of the "presumption of correctness" asserted by the Commissioner of Internal Revenue, or was inconsistent with the "judicial review" requirement of the Administrative Procedure act.

3. Whether an Internal Revenue officer may reject the determination and finding of a Foreign Service officer that certain expenditures, concededly made by him as Ambassador, were necessary and appropriate to the discharge of the taxpayer's duties as Ambassador and disallow such expenditures as proper deductions from his gross income.

4. Whether the respondent may determine, without evidence, that a mere single, isolated but unexplained, $1500 deposit in a joint account of wife and mother-in-law constituted income to husband and wife, particularly where there was no pattern of questionable deposits.

Principal Statutes Involved

The Revenue Act in force in 1949 (Revenue Act of 1939, 26 U. S. C. 1952 ed. Sec. 22) provided, Section 22:

> "(b) *Exclusion from gross income*—The following items shall not be included in gross income and shall be exempt from taxation under this title. • • •
>
> (3) *Gifts, Bequests and Devises*—The value of property acquired by gift, bequest, devise, or inheritance. • • • "

Section 10 of the Administrative Procedure Act, "Judicial Review of Agency Action", (5 U. S. C. Sec. 1009)

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of Review*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Proceedings*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute . . .

(c) *Acts Reviewable*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. . . .

(e) *Scope of Review*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Statement of the Case

The petitioner, William O'Dwyer has been a Magistrate of the City of New York, a County Judge and District Attorney of Kings County, a General in the United States Army, Minister to Italy, and Chairman of the War Refugee Board, and between 1946 and 1950 was Mayor of New York City. In 1950 he was appointed United States Ambassador to Mexico and served as such until December 5, 1952 (Exh. 9f).

The items or transactions involved herein were:

(1) A campaign contribution alleged to have been made to him during his campaign for the Mayoralty in 1949.

(2) Deductions, as business expenses, of sums conceded by respondent to have been spent by petitioners, during William O'Dwyer's tenure as Ambassador, but unreimbursed by the State Department.

(3) A deposit of $1,500 to a joint New York account in the name of Mrs. O'Dwyer and her mother which the Commissioner claimed as income to William O'Dwyer and his wife.

The facts pertaining to the second and third items were stipulated, except insofar as the respondent declined to submit for examination the record on which he acted in making his adverse determination. The facts with respect to the first item were, briefly, as follows:

The Uniformed Firemen's Association (U.F.A.) was an organization composed of New York City Firemen of which one Crane was President, Purcell its Secretary (73a)* and Dolan, its Treasurer (34a).

Crane ran the organization (84a) and Purcell supervised the collection of proceeds from firemen's balls—a principal source of the organization's revenue (38a-39a).

In and prior to 1949, while running the U.F.A., Crane and Purcell embarked upon an enterprise, under the name

* References are to Petitioners' Appendix below, filed herewith.

of Whitestone Estates, Inc., in which they invested nominal amounts of their own money and admitted using substantial amounts of U.F.A. funds (115a). This company acquired 76 acres of land and built 179 houses (116a). It appeared that some $30,000 had been taken from the U.F.A. treasury in the autumn of 1949 and turned over to Crane without receipt or accounting (51a). Charges and rumors of irregularities having been made as to the handling of the U.F.A. funds, Crane and Purcell came under direct investigation in 1950 and 1951 by the New York County District Attorney, and by the Bureau of Internal Revenue. In the course of, or as a result of such investigation, Purcell was convicted of larceny and sent to jail (40a), but Crane's counsel secured an arrangement whereby the District Attorney permitted Crane to testify before the Grand Jury and thereby gain immunity (113a).

In attempting to account for his large withdrawals of U.F.A. funds, Crane testified that, among other expenditures, he made a cash campaign contribution of $10,000 to William O'Dwyer in his 1949 campaign for the Mayoralty of New York City (99a-100a). The Crane story, as first told to the N. Y. County District Attorney, and later to the Kefauver Committee, was that he made a campaign contribution by personally delivering to Mayor O'Dwyer at his official residence an envelope containing $10,000, that no one else was present, and that he knew of no witness to the incident (103a).[1]

The petitioner, William O'Dwyer, who was Ambassador to Mexico at the time of the Kefauver hearings, appeared voluntarily and testified before that Committee, and then

[1] When Crane first appeared before the Kefauver Committee, he declined to talk about his conduct of U.F.A. finances and affairs, pleading the Fifth Amendment (112a), but later he did testify and told the above story. When asked "Were you alone with him" he insisted that he was and that he knew of no witnesses. He repeated this same story to the Bureau of Internal Revenue which had become interested in his tax return (133a).

appeared and testified before the Commissioner. To each he denied, under oath, Crane's story (27a, 29a, Ex. 2).

He also appeared before the Grand Jury, waived immunity and testified fully as to this matter and submitted a net worth statement which substantiated his denial of Crane's story (Ex. 3).

Crane, when pressed to produce corroboration of his story, or face the consequences of disbelief, including a charge of further income tax (139a), turned to his own brother as a possible witness but his brother would have none of it (103a).

Later, an individual named Wilders appeared on the scene for the first time. Wilders was city fireman, a college chum and close friend of Crane (107a, 166a-167a), and helped Crane to buy a car without premium payment, when cars were scarce (159a), and was always willing to go "out of his way" to help Crane (107a). And this was how he came to Crane's assistance, according to their own testimony.

One day in May, 1951, Crane met Wilders in Yonkers and took him for a walk around a Reservoir (114a). In the course of that walk, Wilders spoke of the Gracie Mansion incident and asked Crane whether that occurred on "the day I drove you up there" and reminded Crane that on that particular day he "had an envelope with money in it". Crane thereupon remarked "that's the day", and that he was glad to know that Wilders "was the one that was with him" (172a).

It was not until "some time in 1952" (106a), "8-10-12 months" after the Reservoir walk and talk (135a), that Crane for the first time revised his original story and mentioned Wilders and Finkelstein, the O'Dwyer campaign manager, as having been involved in that trip to Gracie Mansion.

The new story was exposed to scrutiny for the first time at the Tax Court.[2] It was substantially and briefly as follows: Finkelstein, the campaign manager, had solicited a campaign contribution from Crane (87a); on October 10th, 1949, Crane had three things in mind for that day (a) he had to have his car serviced (b) he had to make a trip to the Mayor's mansion, and (c) he had to make a flight to St. Paul to attend a convention. To accomplish these purposes he took with him $10,000 which he received from Dolan about four days prior[3] and drove to Wilders' fire house, where Wilders found him (the two were in conflict as to whether a prior appointment had been made) (158a); that when Crane tried vainly to get a taxicab Wilders offered to "drive him wherever he wanted to" (159a-160a); that Crane accepted the offer and told Wilders to proceed to pick up Finkelstein, and then drive them to the Mayor's mansion; that in front of the mansion a lady was in the Mayor's car whom Finkelstein recognized and with whom he stopped to talk; that the Mayor was on the porch where a valet was helping him on with his coat as he was ready to leave; that he gave the Mayor the envelope with the money and the Mayor, without examining it tossed it to someone and left (94a).

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[2] Wilders and Crane had prepared their testimony for the Tax Court hearing most carefully, Crane testified as to this:

"Q. Have you talked about your testimony and talked it over with Wilders? A. Yes, I have.

Q. And when was that? A. A few minutes ago.

Q. Did you talk about the testimony that you were going to give here? A. We talked about Wilders' participation on this particular incident. Yesterday, the day before, today" (142a).

Wilders, however, denied having spoken with Crane about his testimony *since 1951* (168a).

[3] Dolan testified, however, that he drew for Crane $5,000 on September 26th and $5,000 on October 6th (30a).

The respondent's witnesses before the Tax Court were enmeshed in other contradictions.[4]

Dolan's story of *six* separate withdrawals, of $5,000 each, was consistent, if anything, with a practice by Crane of looting the firemen's funds under guise of expenditures in support of the referendum.[5] Neither he, nor Crane, gave or offered any explanation as to why two $5,000 items were drawn, ten days apart, when a single $10,000 gift was contemplated. And Crane specifically testified that it had never been in his mind to give a $5,000 contribution—that before the money was drawn he had told Dolan "I wanted $10,000" (133a).

References in Crane's direct testimony to the role played by Finkelstein—when contrasted with the thrice-told prior story that Crane was alone, or knew of no witness—were alone sufficient to discredit his story. Crane knew Finkelstein well, and knew him to be Mayor O'Dwyer's campaign manager (87a). He said that Finkelstein was the man who solicited the campaign gift; and that Finkelstein wanted to be present when it was made (88a); that Finkelstein spoke to him after the election about the need for an additional contribution (99a). *Yet Crane never mentioned Finkelstein in his first stories, for over a year.* Finkelstein had denied that such an incident ever took place (131a) and respondent did not call him as a witness.

The Ruling on the Subpoena

Petitioners claimed from the very outset that the Commissioner's determinations were unwarranted by the facts,

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[4] For example, Crane testified that there was never any disagreement between himself and Mayor O'Dwyer as to the referendum on a proposed constitutional Amendment (98a) and thus his contribution in aid of William O'Dwyer's campaign had no relationship to such Amendment. Dolan, on the other hand, testified that the $10,000 was drawn from the firemen's fund under vouchers showing an expenditure in support of that referendum (50a, 65a).

[5] There were four additional withdrawals of $5,000 each, brought out on Dolan's cross-examination, two each on October 14 and October 20, 1949, and all going to Crane (67a-71a).

and also were arbitrary, capricious and inspired by motives having nothing to do with an impartial and fair administration of the revenue laws. At the hearing the Commissioner admitted that determinations of unreported income of $5,000 in 1950 and $15,000 in 1951 were wholly erroneous, without even a particle of rational explanation, except with respect to one $1,500 item represented by a bank deposit to the credit of petitioner Sloan O'Dwyer and her mother (Tr. 7).

To prove the arbitrary character of respondent's determinations, the petitioners subpoenaed the record on which the Commissioner had acted (21a-25a; 28a-33a), but the Commissioner declined to obey the subpoena except for the production only of (a) the transcript of William O'Dwyer's sworn testimony and (b) his financial questionnaire or net worth statement, both relating to 1949.

The Judge of the Tax Court declined to direct compliance with the subpoena (29a) to which exception was duly taken.

At the trial, the petitioners placed in evidence the transcript of Ambassador O'Dwyer's testimony which denied, and financial statement which disproved, receipt of the $10,000 in 1949 (Exs. 2, 3); they also offered a certain documentary proof and evidence which showed that the Commissioner must have had available to him Finkelstein's denial and other evidence negativing his determination of a deficiency. Finkelstein had testified under oath in a judicial proceeding, that such an incident as Crane testified to "never happened" (131a, 145a).

Everyone knows, and Crane admitted knowing (120a) that it is a crime for a candidate occupying an official position such as Mayor O'Dwyer occupied in 1949, to accept or solicit political contributions from Civil Service Employees. (*People* v. *Connolly*, 168 App. Div. 919, 152 N. Y. Supp. 495.) Crane was admittedly a Civil Service employee, in spite of his quibbling on the point (121a). It is just incredible that Mayor O'Dwyer, running for re-

election, would have been so naive as to subject himself to such violation of law, particularly when, according to Crane's story, he could easily have had his campaign manager, then and there present, accept the contribution for him or on behalf of his campaign committee.

Crane's statement about making the campaign contribution to the Mayoralty candidate personally, prompted numerous inquiries by the FBI, by Grand Juries, by a Senate Committee, as well as respondent. No action or proceeding of any character against Mayor O'Dwyer resulted from any of these investigations—except only the Commissioner's arbitrary and baseless determination.

Never, in any reported instance that we have been able to find, has the Government absolved a taxpayer such as Crane from liability for taxes on income traced to his possession, and admittedly received by him, simply on the basis of his unsupported and uncorroborated word that he "gave" the money to another—particularly when the story was contradictory, inconsistent and permeated with an air of fabrication. In this case, the respondent not only absolved Crane, but taxed petitioner solely on Crane's discredited story—which no other agency thought worthy of credence.

Reasons Relied on for Allowance of the Writ

The Court below decided:

(a) that respondent could, in effect, sub-classify political gifts and, without statutory warrant, specify circumstances under which he would treat such a *gift* as *income*, taxable to the donee, and

(b) that even though respondent's determination was entitled to a "presumption of correctness"—for purposes of judicial review—he might withhold from the reviewing court the whole record on which his decision was made.

Each of these propositions, decided in favor of respondent below, involves an important question of federal law, not settled by this court, and decided below in a manner

incompatible with the pertinent legislation, and the past decisions of this and other federal courts.

Not only has the Court below construed incorrectly the substantive and procedural legislation involved; it has raised grave doubts of the constitutionality of that legislation. The Sixteenth Amendment was never intended to permit the taxation of *gifts*—but only *income*. The statutory scheme for review of the Commissioner's determinations is jeopardized by grave due process considerations if it be construed to permit suppression and concealment of the record on which respondent makes decisions that thereafter become adorned with a badge of "presumption of correctness".

This Court, by grant of certiorari on June 1, 1959, in *Kaiser* v. *United States*, 262 F. 2d 367, has given recognition to the necessity for review of the broad claims by the respondent to extend his authority to reclassify gifts as income, or subclassify gifts in such fashion that some will be taxable (No. 858, O. T. 1958).

1.

Even if Crane gave a campaign contribution to petitioner, such gift did not constitute receipt of taxable income.

The Court of Appeals refrained from approving the Tax Court's findings of fact, saying only that it was "not prepared to hold that the findings of fact are clearly erroneous as we are not left with the definite and firm conviction that a mistake has been committed" (p. 48, *infra*).

Passing by the inherent improbabilities of Crane's story, the inquiry still remains as to whether this alleged occurrence involved receipt of taxable income.

The Tax Court found that: "The evidence strongly supports the view that Crane intended the payment as a political or campaign contribution" (R. 13a).

Assuming—without admitting—this conclusion, we have nothing but a "political contribution" or a "campaign contribution", both of which are interchangeable terms for a mere gift.

Merriam's Webster's New International Dictionary (1956) sets forth as the only synonyms for "gift", the words "donation, contribution" (p. 156); and "contribute", is defined "to give or grant in common with others" and "contribution" as "the portion which an individual furnished to the * * * whole which is formed by the gifts of individuals".

The Revenue Act in force in 1949 provided, Section 22:

> "(b) Exclusion from gross income—the following items shall not be included in gross income and shall be exempt from taxation under this title. * * *
>
> (3) Gifts, Bequests and Devises—the value of property acquired by gift, bequest, devise, or inheritance. * * * "

Such exclusion has been contained in the Revenue Acts from their inception, and is continued in Sec. 102(a) of the present Act: "Gross income does not include the value of property acquired by gift. * * * "

The pertinent regulation of the Bureau, Regs. 118, Sec. 39.22(b) (3)-1 likewise states "Gifts and Bequests (a) Property received as a gift * * * is not includible in gross income. * * * "

A serious constitutional question would be presented if the statute were to read or be construed otherwise.

In *Edwards v. Cuba R.R. Co.*, 268 U. S. 628, 633, there was presented the question of the taxability of subsidy payments made to induce the building and operation of a railroad. The Court said:

> "The subsidy payments taxed were not made for services rendered or to be rendered. They were not

> profits or gains from the use or operation of the railroad, and do not constitute income within the meaning of the Sixteenth Amendment".

Compare, *Brown Shoe Co., Inc.* v. *Comm'r*, 339 U. S. 583.

Since a "contribution" means a "gift" in plain language; since the words are synonymous, and since the language of exclusion is clear and unambiguous, it would seem that the inquiry should end there. As was stated in *United States* v. *Merriam*, 263 U. S. 179, 187-188, a case dealing with a similar exclusion from gross income ("bequest"):

> "in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

There is certainly nothing in the statute to justify treatment of a gift or a contribution for tax purposes on any different basis merely because of its characterization by the word "political" or "campaign". The Commissioner, in Revenue Ruling I.T. 3276, reported in Cum. Bul. 1939-1, Part I, p. 108, said exactly that:

> "Advice is requested whether (1) contributions to political organizations are allowable deductions in the donor's Federal income tax return, and whether (2) political gifts or donations to individuals or to political organizations are subject to Federal Income Tax.
>
> "With respect to the first inquiry, it is held that contributions to a political organization are not proper deductions in the donor's Federal income tax return, there being no provision in the Revenue Act of 1938 which allows such deductions.
>
> "With respect to the second inquiry, it is held that a political gift received by an individual or by a political organization is not taxable income to the recipient."

Such was the respondent's opinion during the tax year under review, for five years thereafter and which remained as such until purportedly "modified" in 1954—while this very case was pending in the office of the agency which "promulgated" the modification, Rev. Rul. 54-80, 1954-1, Cum. Bull. p. 11.

The substance of the purported modification is to the effect that the statutory exclusion of such gifts from gross income would only be recognized where the gift is used or held for campaign expenses; but that where part or all is "diverted" to the personal use of the candidate it constitutes taxable income.

The respondent, in other words, asserted the authority to classify gifts, and tax them as income, depending on their ultimate use by the donee.

In *Bogardus* v. *C.I.R.*, 302 U. S. 34, 40, however this Court said:

> "If the sum of money under consideration was a gift and not compensation, it is exempt from taxation and *cannot be made taxable by resort to any form of sub-classification.* If it be in fact a gift, that is an end of the matter; and inquiry whether it is a gift of one sort or another is irrelevant. This is necessarily true, for, since gifts are made nontaxable, there can be no such thing under the statute as a taxable gift." (emph. supp.)

Or as stated by Judge Disney in *Bert P. Newton*, 11 T. C. 512, 520:

> "From the *Bogardus* case was derived certain basic considerations: that gift and compensation for personal services are mutually exclusive. * * * "

A donor's motives may not be entirely unselfish. Motives as they relate to political gifts are sometimes complex. It is well known that some will make political contributions to each of the opposing candidates. They are

nonetheless gifts, and not taxable, regardless of motive, if the intention was to make a gift.[6]

In *Helvering* v. *American Dental Co.*, 318 U. S. 322, the Board of Tax Appeals had rejected a claim that gifts were involved because the donors did not act for "altruistic reasons or out of pure generosity". But this court reversed the Tax Court and said, at pages 330-331:

> "With this conclusion we cannot agree. We do not feel bound by the finding of the Board because it reached its conclusions, in our opinion, upon application of erroneous legal standards. Section 22(b)(3) exempts gifts. This does not leave the Tax Court of the United States free to determine at will or upon evidence without judicial review the tests to be applied to the facts to determine whether the result is or is not a gift. The fact that the motives * * * were those of business, or even selfish, if it be true, is not significant."[7]

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[6] The Court below, and the Tax Court, fell into conflict in speculating as to what legislation, if any, the firemen hoped would be enacted when they supported Mayor O'Dwyer—the latter concluding it was salary legislation (9a-10a) and the former feeling it was pension legislation (p. 45, *infra*).

The record is actually barren of proof of any "consideration" of any sort, for the campaign contribution. It was an election year. Crane testified that he *preferred the petitioner over his opponent*, as a candidate for Mayor.

> "When the choice appeared to be that of supporting Mr. O'Dwyer, or Mr. ..... I think the Republican candidate was Mr. Newbold Morris—the fireman got concerned about it, feeling that he had no choice but to support Mr. O'Dwyer" (R. 86a).

The only conversation alleged to have been had at the moment of the "gift" was

> "I told him I had promised him some support. The firemen would support him and I was presenting him with this envelope as evidence of that support" (94a).

[7] A gift may be a business expense and as such a legitimate deduction, e.g., *Peters* v. *Smith*, 221 F. 2d 721. And the very obvious business or selfish motive of the donor did not transform a gift into something else in *Glenn* v. *Bates*, 217 F. 2d 535 (Stewart, J.).

No court, or writer, in describing the criteria of a gift has ever made reference to the later use or disposition of the funds by the donee.* E.g., 1 Mertens, Law of Federal Income Taxation, Sec. 7.12, Ch. 7, p. 22:

> "The most commonly accepted essentials of an inter-vivos gift are: capacity and an intention to make a gift, an irrevocable present transfer of title, dominion and control, delivery and a valid acceptance by the donee."

The principal question is usually one of intention.

> *Willkie* v. *C. I. R.*, 127 F. 2d 953;
> *Brayton* v. *Welch*, 39 F. Supp. 537;
> *Alice M. McFarlane*, 19 T. C. 7;
> *J. Marion Wright*, 30 T. C. 392.

In 1 Mertens, Federal Income Taxation, Sec. 7.10, Ch. 7, p. 17, it is said:

> "As used in the Sixteenth Amendment, the term 'income' is not the equivalent of 'economic income' which term might well include decreases in or additions to one's wealth from any source derived. The Statutes promulgated since the Sixteenth Amendment have in effect drawn this distinction by specifically providing that property acquired by gift, bequest, devise or inheritance is not included in gross income."

Even according to the respondent's peculiar distinction between a contribution expended by the donee for one purpose, or "diverted" for another, the record is not "devoid of evidence" (R. 13a) as to disposition of the gift. The sole testimony is that the political contribution was in fact used as such. Crane testified that after the election, the

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* In *Bail Fund of the Civil Rights Congress*, 26 T. C. 482, the taxpayer received "contributions solicited by the Bail Fund for its general purposes" and the funds were used "to furnish bail for persons held in custody in certain type of cases". With reference to the contributions received, Judge Raum there held:

> "The Commissioner's determination treated these amounts as income to petitioner. We think the Commissioner erred in this respect. The amounts in question were plainly contributions or gifts, and therefore not includible in gross income."

Campaign Manager said "he knew I gave substantial amounts of money and could I possibly give them some more" (99a), a statement incompatible with "diversion" to personal use.

In any event, the respondent has been permitted to adopt an improper and unwarranted technique of attempting to reclassify a gift as income. It is unauthorized by statute, and without basis in precedent. It is unrealistic and without sense or justification; it disregards the fact that often much of a candidate's own resources are expended in campaigning.[9]

There was cited below *Mayson L. Reichert*, 19 T. C. 1027, a case that was affirmed on other grounds, but that case involved a whole setting and practice of payments for services, made in non-campaign years, and the question there presented was stated in the opinion itself as "whether petitioner received income in those years from pay-offs and the like in the guise of political contributions."

The Commissioner has never dared even to suggest that such was the situation here.

The Court below never really came to grips with, or even touched upon, the real issue presented by this case: may the respondent, contrary to *Bogardus* v. *Helvering*, 302 U. S. 32, classify and subdivide types of gifts and rule that some of them are taxable as income and some of them are not?

Instead, the Court below assumed that such inquiry was foreclosed to it by the publication by respondent, in 1954, of Rev. Rul. 54-80. Such "Revenue Rulings", however, do not have the force and effect of Regulations, much less of

[9] Political gifts are apparently considered immune from tax in certain circumstances even when *not* made as campaign contributions. Insofar as we can ascertain from any public record or decided case, respondent never saw fit to treat as taxable income payments, motivated by sympathy with the donee-legislator's politico-economic philosophy, of the kind reported, e.g., in N. Y. Times Sept. 19, 1952, p. 1 ("Nixon Affirms Getting Fund of $16,000.00 from Backers").

law. They have, and are intended to have, not much more weight than a press release. See, e.g. Cum. Bull. 1954, p. 1:

> "Revenue Rulings reported in the Bulletin do not have the force and effect of Treasury Department Regulations" and "each published ruling represents the *conclusion of the Service* as to the application of the law" (italics supplied).

See also, *United States* v. *Bennett*, 186 F. 2d 407, 410 ("these rulings * * * made to order * * * [have] no more binding or legal force than the opinion of any other lawyer") and *Bartels* v. *Birmingham*, 332 U. S. 126, 132.

The reach of the Sixteenth Amendment, and of the statutes enacted pursuant to the authorization it conferred, has never heretofore been construed to extend to *any* type of gift. The Court below has permitted the respondent to exercise a power which would enable him to police all gifts, regardless of character, or source, and tax them as income if he concludes they were not used as the donor wished.

The factors probably moving this Court to grant, on June 1, 1959, *certiorari* to review *Kaiser* v. *United States*, 262 F. 2d 367, are present here, and should not be obscured by the confusion of the Court below in addressing itself to the strawman question as to the retroactivity of the 1954 Revenue "Ruling". Even a Regulation—which the 1954 dictum certainly was not—"can furnish no sustenance to the statute" by "an attempted addition to the statute of something which is not there," *United States* v. *Calamaro*, 354 U. S. at p. 359. A gift is a gift and all the I. T.'s, R. R.'s, O. D.'s and T. D.'s in the world cannot convert a gift into income.

2.

Petitioners were denied due process of law and deprived of a fair hearing when the Tax Court refused to require the Commissioner to produce for review the whole record on which he had acted.

In order to obtain and present evidence that the Commissioner's actions were arbitrary, the appellants sought

to subpoena his entire file so that the Tax Court could have before it for review the "whole record" on which the Commissioner had acted.

It is unthinkable that a determination by the Commissioner, if shown to have been made by the toss of a coin, could stand. Nor could a decision be sustained, if it appeared that such decision were motivated by considerations of political advantage.

It has been long settled that the duty of the Tax Court (and its predecessor, the Board of Tax Appeals) has been to set aside the Commissioner's determination, if arbitrarily made, regardless of whether the taxpayer was able to establish the negative of the factual proposition implicit in the determination of the deficiency.

In *Helvering* v. *Taylor*, 293 U. S. 507, 514, this Court said:

> "The fact that the Commissioner's determination of a deficiency was arbitrarily made may reasonably be deemed sufficient to require the Board to set it aside."

Whether the Commissioner's determination was arbitrary or rested "upon a false foundation" (*Wilson Coal Land Co.*, 87 F. 2d 185, 189) or the result of "mere guess work" (*Fairmount Cemetery Association* v. *Helvering*, 79 F. 2d 163, 165) or with "no foundation for the price figure" (*Andrews* v. *Commissioner*, 135 F. 2d 314, 318 C. D. 320 U. S. 748) or "erroneous conclusions" of the examining Revenue Agents (*Acorn Refining Co.*, 2 BTA 253) or based upon "accounting gymnastics" (*Index Notion Co.*, 3 BTA 90) may, and often does, *appear in the Commissioner's own records.* That is where evidence of arbitrary action is most likely, if not solely, to be found, and that is what the petitioners sought to establish in this case.

In *Blair* v. *Oesterlein Mach. Co.*, 17 F. 2d 663 (mod. oth. grds. 275 U. S. 220) it was said by the Court of Appeals:

> "it is difficult to conceive of any judicial proceeding more intimately dependent upon the evidence records, and data, on which the findings of the Commissioner in tax cases is based, than the proceedings reviewing those decisions on appeal by the Board of Tax Appeals * * *.
>
> "This tribunal [The Board of Appeals] * * * will be presumed to possess the power to call to its aid every agency essential to the full and complete investigation of the issues committed to its jurisdiction. Sustaining, as we must, the power of Congress to call this Board into existence, and to vest it with the broad jurisdiction conferred by the Revenue Act, *it would be a travesty to hold that the evidence upon which that jurisdiction may be intelligently exercised can be withheld by the subordinate officer of the government, whose decisions the Board is specially vested with power to review* * * *.
>
> "The right of appeal here afforded has special reference to the protection of the taxpayer from possible arbitrary, unjust, or mistaken action by the officials of the Revenue Department. To sustain the contention of the Commissioner would amount to the practical nullification of the act in so far as it provides for the right of appeal" (emphasis supplied).

In the present case, however, when the "subordinate officer of the Government, whose decisions the Board is specially vested with power to review" was called upon to respond to a subpoena demanding production of "the evidence, records and data on which the findings of the Commissioner in these tax cases is based," the response of counsel for the subordinate officer was a curt refusal (28a). There was no claim of privilege made.

The Tax Court, without directing production of the material called for by the subpoena, and *without even examining it to determine its relevancy*, declined to enforce the subpoena (R. 29a). This was not only error, as a matter

of law, and Tax Court rules and practice,[10] but a violation of due process of law. It crippled the petitioner's effort to establish that the determination was arbitrary and capricious.

Prior to the actual hearing in the Tax Court, the taxpayer has no coercive methods of investigation or discovery procedures available to him. See *Bowen, Discovery in the Tax Court*, 44 A. B. A. J. 129 (1958). The Commissioner, on the contrary, has a vast and effective investigative apparatus, which enables him to compel testimony under oath not only from the taxpayer and his agents and banks, but any other person he may see fit to interrogate.

As John Potts Barnes wrote in 28 Taxes, the Tax Magazine, 1211, 1212, 1214:

> "The several different kinds of visitorial and investigative powers necessary for effective enforce-

[10] The rule of practice previously followed in the Tax Court, required Judge Raum to draw an unfavorable inference from the Commissioner's refusal to open his files.

As stated in Mertens, *Federal Income Taxation*, Sec. 50.87 (p. 179 of c. 50):

> "if either the Commissioner or the taxpayer fails to comply with a subpoena, the issue of fact that might have been proved through the records will be resolved against the defaulting party."

The Tax Court, in *Pelham G. Wodehouse*, 8 T. C. 637, drew appropriate inferences from the refusal of a Commissioner to obey subpoenas whereby "the petitioners proposed to prove * * * that such records * * * would demonstrate errors in the collector's records for that period".

The Court said (at p. 642 of 8 T.C.):

> "We need not discuss the reason for the refusal of the respondent's agents to testify as directed. We need only cite Blair v. Oesterlein, 275 U. S. 220 and Brewer v. Hassett, 2 FRD 222 to demonstrate that the respondent's position is utterly unwarranted and wholly indefensible. * * * *Therefore the only conclusion justified by this state of facts is that the respondent's files and records would have proved the petitioner's contention*". (Emphasis supplied.)

ment of the tax laws by the Commissioner and his subordinates are found in about half a dozen sections of the Internal Revenue Code * * *.

"The courts, in consonance with the apparent Congressional intent, have held that the powers conferred extend to all persons in addition to the taxpayer himself, who have records or information that may have any bearing upon the determination of the correct tax liability of the person under investigation."

In the present case the petitioners were subjected to a most intensive investigation over a period of four years. The Commissioner's record contained sworn denials by petitioner, and other facts which discredited Crane's story (130a-132a). If the determination made on the basis of that investigation was of an arbitrary or capricious nature the petitioner had a constitutional right to expose it, sufficient foundation having been laid by the production of William O'Dwyer's sworn testimony denying the receipt of the alleged campaign gift, his sworn net worth statement which disproved the receipt of any such gift, and respondent's concession, in open court, that $15,000 of his initial determination was arbitrary and without basis in fact.

The Constitution, and elementary principles of justice and fair play require that those in petitioners' situation be afforded access to the secret evidence in respondent's file, at least before the proceeding is concluded. As was said by Judge Maris for the United States Emergency Court of Appeals in *Victor* v. *Porter*, 157 F. 2d 769, 772:

"The complainants assert that they did not receive a fair hearing because the area rent director did not inform them as to the pertinent data concerning the housing unit upon which he relied as comparable in making his reduction orders and that they were thereby deprived of due process of law. * * * As we recently had occasion to point out in Direct Realty Co. v. Porter, Em. App. 1946, 157 F. 2d 434, while procedural due process definitely requires that a

hearing be accorded at some stage of an administrative proceeding, it does not require that the hearing take place at the initial stage. Accordingly, if the complainants in the ensuing protest proceeding were apprized of the evidence upon which the Administrator relied, and were then given a genuine hearing de novo the demands of due process have been met."

See also:

Fury v. *Fleming*, 161 F. 2d 189, 194;
Pownall v. *United States*, 159 F. 2d 73 (C. A. 9; aff'd 344 U. S. 742).

These principles have even been extended to the process of review of selective service classifications, a procedure not even subject to the provisions of the Administrative Procedure Act. In *Simmons* v. *United States*, 348 U. S. 397, the question involved was whether a selective service registrant who claimed to be a conscientious objector had been accorded a fair hearing by a Department of Justice hearing examiner, to whom the Selective Service Appeals Board had referred the matter for a report as to whether the claim of exemption was justified. At that hearing the petitioner made request for a fair resume of a F.B.I. report that had been transmitted to the hearing examiner. His request had been denied. This Court held that the registrant had been deprived of a genuine hearing.

Mr. Justice Clark said:

"A fair resume is one which will permit the registrant to defend against the adverse evidence—to explain it, rebut it, or otherwise detract from its damaging force—the Congress in providing for a hearing, did not intend for it to be conducted on the level of a game of blindman's buff. The summary was inadequate and the hearings in the Department was therefore lacking in basic fairness" (p. 405 of 348 U. S.).

"This is not an incidental infringement of technical rights. Petitioner has been deprived of the

> fair hearings required by the Act, a fundament safeguard, and he need not specify the precise manner in which he would have used this right and how such use would have aided his cause—in order to complain of the deprivation" (p. 406).

In *Gonzales* v. *United States*, 348 U. S. 407, a similar and related question was presented.

It is significant that the Government conceded in oral argument in the *Gonzales* case that the registrant should have a right to "examine all information in his file" and contended that this remedy was made available by a procedure for asking for a rehearing after the decision of the Appeal Board. This Court said with respect to this:

> "We believe these remedies to be too little and too late. Too little, because the right to present petitioner's side of the cause is more than the right to correct 'errors' made by the Department in its recommendation."

The Court, in *Victor* v. *Porter*, 157 F. 2d 769 (*supra*, p. 22), emphasized two requirements where an administrative decision is made on secret evidence, (1) that complainants be "apprised of the evidence upon which the Administrator relied"; and (2) that the complainants be given a "hearing de novo". The Court below, however, thought that it was enough to give only the latter, but not the former, as long as the Tax Court's decision was not itself based on secret evidence (p. 43, *infra*). But when a decision is based entirely, or in any measure, on the "presumption of correctness" engirdling an administrative determination, which was in turn based on secret evidence, the taxpayer is denied a fair hearing.

The Court below declares, without the slightest basis for saying so, that "the determination of the Commissioner * * * [was] based upon substantially the same evidence presented before the Tax Court" (*infra*, p. 48).

How does the court know this? Not from evidence or any finding of fact.

The court below in rejecting the petitioner's appeal, uses the shopworn phrase "fishing expedition" and suggests an intention to "raid Government confidential files for some purpose, as yet not clearly disclosed". Not at all! The failure of the respondent to call Finkelstein, and the sharp conflict between the early and later Crane version, and its embellishment by Wilders, all contribute to a showing of the probable existence, in the respondent's file, of evidence of the arbitrary or capricious nature of his determination.

The probable existence of Revenue Agents' reports in this case contrary to the respondents' ultimate determination is more than suggested by the evidence that Mayor O'Dwyer's sworn and public denials of Crane's story were made and specifically given to the Commissioner's agents in March of 1951; no action was taken against him for about three years thereafter; and it was only some time after a change in administration occurred, that the adverse determination was made by the Commissioner.

The weight of such evidence as an opinion by a Revenue Agent or other subordinate of the Commissioner, contrary to the Commissioner's own, has been sharply upgraded by the decision of this Court in *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474. The Court there held that a Court of Appeals, in reviewing a Labor Board decision, must give substantial weight to a report of a trial examiner, who had himself been reversed by the Labor Board, saying:

> "Surely an examiner's report is as much a part of the record as the complaint or testimony" (p. 493) and "evidence supporting a conclusion may be less substantial when an impartial experienced examiner who has observed the witnesses and lived with

> the case he has drawn conclusions different from the Board's" (p. 496).

A taxpayer faced with the injurious handicap that there is a "presumption of correctness" shielding an administrative determination that he seeks to reverse, is entitled to ventilate the basis of that determination. As was said in *Greene* v. *McElroy*, June 29, 1959, 27 LW 4528, 4534:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."

Effect of the Administrative Procedure Act

Section 10(e) of the Administrative Procedure Act expresses a statutory command which requires respondent, in a proper case, to show the Tax Court such information as he may have in his file as is adverse or inconsistent with the determination sought to be reviewed.

Section 10(e) requires a "reviewing court" to review "the whole record" in determining whether "agency action" is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".

That section has been authoritatively described (e.g. Attorney General's Manual on the Administrative Procedure Act, p. 93) as a "general restatement of the principles of judicial review embodied in many statutes and judicial decisions" (see also Sen. Doc. 248, 79 Cong. 2d Sess. pp. 83-84; 224, 229, 406-407).

The Tax Court was "created by Congress in 1924 to provide an 'independent review' of" the administrative decisions of the Commissioner of Internal Revenue. See

Note, 1957, 57 *Col. Law Rev.* 717; *Old Colony Trust Co.* v. *C.I.R.*, 279 U. S. 716, 721.

As stated in *Williamsport Wire Rope Co.* v. *U. S.*, 277 U. S. 551, 564, the "sole function" of the Tax Court "consists in reviewing on appeal, determinations of the Commissioner under the Revenue laws."

The distinction between the Commissioner's administrative process of investigation, and initial determination, and the judicial process of review by the Tax Court was well stated by John Potts Barnes in "Inquisitorial Powers of the Federal Government Relating to Taxes", 28 Taxes, The Tax Magazine, p. 1211.

That the Commissioner of Internal Revenue is an "agency" or "administrative agency" within the meaning of the Act is not open to doubt. As Mr. Barnes wrote "the Commissioner alone * * * is empowered to do those things * * * which are the very essence of the administrative process". In the debate on the act in the House on May 24, 1946, the Congressman Walter, a co-draftsman of the Act, made specific reference to the "Bureau of Internal Revenue" as an agency contemplated to be covered.

Unless there be some basis for the Commissioner's claim that the Tax Court is not a "reviewing Court" within the meaning of Section 10(e), an order directing compliance with the subpoena, as the only procedural device calculated to bring up the "whole record", was petitioners' right as a matter of course.

The Court below boldly declared that Tax Court "review" is exempt from the "whole record" requirement of Sec. 10(e), thereby ignoring the rule of *Brownell* v. *Tom Wu Shung*, 352 U. S. 180, 185:

> "'Exemptions from the Administrative Procedure Act are not lightly to be presumed' Marcello v.

> Bonds, 349 U. S. 302, 350, and unless made by clear language of supersedure the expanded mode of review granted by that Act cannot be modified."

The legislative history of the Administrative Procedure Act shows that it was expressly contemplated that the Tax Court's review of the Commissioner's administrative determination was covered by Section 10 of that Act.

The report of the Senate Judiciary Committee (Sen. Rep. 752, 79 Cong. 1st Sess.) contains a detailed analysis of the Act and is reprinted at pages 185-231 of Sen. Doc. 248, 79th Cong. 2d Sess., the Legislative History of the Administrative Procedure Act. At page 214 of this Senate Document, the Committee submits its analysis of Section 10 ("Judicial Review") subsection e ("Scope of Review"). Referring to the six alternative categories of review, the Committee submits as one example of the type of review referred to:

> "Thus, where adjudications such as tax assessments are not made upon an administrative hearing and record, contests may involve a trial of the facts in the Tax Court or the United States District Court." [11]

The duty of the "reviewing court" to look at the "whole record" when asked to set aside agency action as "arbitrary" or "capricious" is set forth in the last sentence of Section 10(e) in the phrase: "The court shall review the whole record" in making the "foregoing determinations" i.e., the determination whether the action complained of is arbitrary or capricious, contrary to constitutional right, in excess of statutory jurisdiction, etc.

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[11] In almost identical language, at page 279 of Sen. Doc. 248, the House Report on the Administrative Procedure Act (H. Rep. 1980, 79th Cong., 2d Sess.) declares it to be the intention of the legislators that the Tax Court's review of the Commissioner's assessment is intended to be embraced within the types of judicial review to be governed by the standards set forth in Section 10(e) (5 U. S. C. Sec. 1009(e)).

That the Tax Court is a "court" within the meaning of the Administrative Procedure Act (regardless of how it may have been characterized for other purposes, or other occasions) is established by the "Attorney General's Manual on the Administrative Procedure Act" issued by Attorney General (now Mr. Justice) Clark in August, 1947. At page 10 of that report it is stated:

> "The term 'courts' is not limited to constitutional courts, but includes the Tax Court, the Court of Customs and Patent Appeals, the Court of Claims, and similar courts. Sen. Rep. p. 38 (Sen. Doc. p. 408)."

The Court of Appeals, however, in the face of the plain intention of Congress to make review of all administrative proceedings subject to Section 10 of the APA (except as explicitly provided for therein) holds that Section 10(e), in referring to the "whole record", is limited to formal agency action specified in Section 5, 7 and 8 of the Act. (*infra*, p. 40) Its reasoning, however, is a pure non-sequitur, for it suggests that otherwise the Commissioner's investigation is subject, procedurally, to the requirements of Section 5, 7 and 8. The one issue has nothing to do with the other. In fact, in Section 10(e) Congress made specific reference to the type of Administrative action subject to trial *de novo*—meaning precisely the action exempted from 5, 7 and 8. (See Sen. Doc. 248, 79 Cong. 2nd Sess. p. 214.)

Section 10 deals with Judicial Review of administrative decisions, whether made after formal hearing or otherwise. The opinion below obscures the applicability of Section 10 to *all* review of Agency action. In the absence of an express exemption in the statute, the Tax Court is a "reviewing Court" within the meaning of Section 10; review by it of the Commissioner's decision is required to be conducted in accordance with the standards set forth in Section 10; and thus production of the "whole record" before the agency is required when it is asserted, with probable cause, that there has been arbitrary or capricious action by the agency.

3.

The non-personal expenditures concededly made by petitioner as Ambassador to Mexico were deductible as business expenses.

Manifested throughout the examination of the petitioners' 1949, 1950 and 1951 returns was a determination to saddle them with tax liabilities regardless of the law or the facts. As evidence of this statement we need only refer to the original notices of deficiency for 1950 and 1951 which included as alleged unreported income sums of $5,541.02 in 1950 and $14,156.48 in 1951 which were finally admitted to have been wholly erroneous. Such an error is not merely excessive zeal to protect the revenue; it is capricious and the exercise of administrative power for an arbitrary purpose.

The petitioners placed in evidence their original records and accountant's work papers showing the method used to determine deductions for unreimbursed expenditures made as Ambassador to Mexico (Ex. 1a). The Commissioner had disallowed the entire deduction of $6,135.94 claimed by petitioners for 1950 and $10,000 of the $12,266.26 claimed for 1951.

Upon examining the exhibits, the Tax Court overruled these determinations and allowed deductions of $1,957.41 for 1950 (as against Commissioner's allowance of *none*) and of $7,875.50 for 1951 (as against the Commissioner's allowance of $2,266.26).

The Commissioner deliberately shut his eyes to what is common knowledge: that the duties of an Ambassador require unusual and heavy expenditures, beyond his allowance, in carrying out his official functions; and that the Government has almost always failed to prove sufficient funds to defray the actual expenses of any of its Ambassadors.

Petitioner's accountant did, in fact allocate a reasonable portion of the total expenses for his personal purposes but the Commissioner failed to take even such allocation into consideration and arbitrarily disregarded the actualities.

The varying positions taken by (1) the Commissioner, in his initial determination; (2) his counsel, on brief, in the Tax Court, in conceding error and (3) Judge Raum in finding additional error, all go to accentuate one proposition: that the opposition to the deductions claimed is based on speculation and conjecture.

It is submitted that the Commissioner's assumption that the Internal Revenue Code either gives him the power to veto an expenditure by an American Ambassador or to hold such Ambassador to a stricter segregation of public and private functions than would be the situation of an ordinary salesman, is, indeed an arrogation of power not justified in the law or reasonable in practice.

The inadequacy of the statutory representation allowance to American Ambassadors is so well known that the Court can perhaps take judicial notice of the fact. It is a truism that acceptance of a post as Ambassador involves a tremendous personal sacrifice for the individual accepting the responsibility. It is a measure of the discriminatory and arbitrary action taken by the Commissioner that this is the first recorded instance of disallowance of unreimbursed expense deductions claimed by an American Ambassador.

We submit, as an expert witness, our late Secretary of State testifying before the United States Senate Subcommittee on Appropriations on April 26, 1955:

> "I note that the House has also reduced our requests for operational allowances from $700,000 to $475,000. In terms of our general budget these savings are slight. Yet the loss of the $225,000 can have a far-

reaching effect upon the very character of our Foreign Service. Representation is an essential part of the conduct of our foreign relations. Do we want a Foreign Service, the most important posts of which can be held only by men of private means, whether or not they are best suited for the job? Or, do we desire a Foreign Service in which the best can serve regardless of their private financial position? If we are to have a truly democratic Foreign Service, we must be prepared to provide our officers with adequate operational allowances in order to enable them to do the amount of entertaining which their position demands of them as well as to enlarge in other activities of a representational character. Our key officers cannot, on their present salaries, engage in activities necessary for the maintenance of friendly contact and for the successful carrying out of their work."

In addition, in his testimony at page 145, Secretary Dulles stated:

"The so-called operational allowance was cut $225,000 and the representation allowance is quite inadequate under present circumstances. It is almost insignificant as to what is paid in that respect by the British Government, for example. I have visited many of these embassies and consulates abroad. I have been to 32 countries since I have been Secretary of State, something which no other Secretary has even approximated, and I find that the burdens that are thrown upon our people for entertaining are excessive and are creating situations where more and more it is impossible to get people to take these positions unless they have independent means. That is, of course, a problem with which we have always been faced with the bigger embassies, such as at London and Paris."

4.

The Commissioner's determination that a mere isolated bank deposit of $1,500 constituted income was erroneous and should have been set aside.

The statutory notice increased the 1951 income of the petitioners by the amount of $15,656.48, which the Commissioner claimed was additional income unreported for the year. At the hearing, the Commissioner admitted that the statutory notice was completely in error, except that he continued to insist on a claim of omission of income of an item of $1,500.

The evidence with respect to this item showed that on July 16, 1951 a deposit of $1,500 had been made in a joint bank account maintained by Mrs. O'Dwyer and her mother. The Commissioner did not offer to prove any facts or circumstances claimed to justify his finding that such deposit constituted income.

As Judge Parker said in *Sandford & Brooks*, 35 F. 2d 313, "Income * * * is not synonymous with receipts".

This Court has recently said, in *Holland* v. *United States*, 348 U. S. 121, 137-138:

> "Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income".

Or, as stated by the Court of Appeals in *Hague's Estate* v. *C.I.R.*, 132 F. 2d 775, 776 (C. D. 318 U. S. 787):

> "It is true, as has been argued by petitioners, that proof that bank deposits were made, is not enough to show the receipt of income and, a fortiori, of taxable income. * * *"

The Commissioner, with his array of vast inquisitorial powers, could discover no actual omission, no likely source

of income, no indicia of any kind of concealed income. He nevertheless seized upon this deposit as income.

However a deposit in a joint account could not in any case be presumed to be the income of one. The evidence, before the Tax Court, of joint ownership of the account placed on the Commissioner a burden he did not meet—to establish the identity of the owner and the nature of the joint deposit. The presumption of correctness cannot be relied on when an absence of *any* evidence to support a determination is demonstrated.

CONCLUSION

For the foregoing reasons it is respectfully prayed that the petition for a writ of certiorari be granted.

PAUL O'DWYER,
Attorney for Petitioners.

HOWARD N. MEYER,
of Counsel.

Decision Below

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ON PETITION TO REVIEW THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

(Argued January 13, 1959. Decided April 21, 1959.)

Before SOBELOFF, Chief Judge, and PAUL and BOREMAN, District Judges.

BOREMAN, District Judge:

William O'Dwyer and Sloan O'Dwyer here petition for review of decisions of the Tax Court determining deficiencies in the payment of income taxes for the years 1949, 1950 and 1951. For those years they filed returns as husband and wife. The findings of fact and opinion of the Tax Court are reported in 28 T. C. 698, November 1957. The 1949 return was filed at New York but the 1950 and 1951 returns were filed at Baltimore. To avoid review of proceedings at a single trial by two circuits, the parties agreed to review by this circuit.

William O'Dwyer was Mayor of the City of New York from November 1945 until he resigned in August 1950. He had earlier held other public offices. On August 30, 1950, he was appointed Ambassador to Mexico and served in that capacity until his resignation in December 1952.

The Commissioner of Internal Revenue determined that William O'Dwyer received $10,000.00 from one Crane in 1949 which constituted unreported taxable income. With respect to 1950 and 1951, the dispute related to the disallowance of unreimbursed expenditures claimed by said O'Dwyer to have been made by him as Ambassador, and the failure to report, for the year 1951, an item of $1500.00 represented by an unexplained deposit made by Sloan O'Dwyer, from Mexico, in a joint bank account carried in her name and the name of her mother in a New York bank. The Commissioner determined deficiencies against petitioners for each of the three years, although the Tax Court modified and reduced the asserted deficiencies arising from the disallowance of claimed official expenditures as Ambassador. These determinations are attacked by taxpayers as arbitrary, capricious and improperly motivated.

By direct and positive assertions, as well as by innuendo, insinuation and intimation, taxpayers charge that the determinations of the Commissioner were influenced by political considerations and were arbitrary and capricious, without foundation.

It is a well-established and recognized principle that a determination, by the Commissioner of Internal Revenue, of deficiencies in a taxpayer's income tax is presumed to be correct, and the burden in the Tax Court is upon the taxpayer to prove its incorrectness. *Lias* v. *C. I. R.*, 235 F. 2d 879 (4 Cir. 1956); *Harris* v. *C. I. R.*, 174 F. 2d 70 (4 Cir. 1949); *Miles-Conley Co.* v. *C. I. R.*, 173 F. 2d 958 (4 Cir. 1949); *Greenfeld* v. *C. I. R.*, 165 F. 2d 318 (4 Cir. 1947); *Miller Mfg. Co.* v. *C. I. R.*, 149 F. 2d 421 (4 Cir. 1945). See also 47 C. J. S., Internal Revenue, § 901 (1946).

The Government, although armed with this presumption of correctness upon which it could have elected to rely, goaded by taxpayers' accusations, produced witnesses before the Tax Court whose testimony related primarily to the alleged receipt by William O'Dwyer of the sum of $10,000.00 in 1949. These witnesses were Crane, Dolan and

Wilders and they were subjected to extensive, vigorous and grueling cross-examination. Crane and Dolan had given statements in writing, pertaining to the same subject matter, to the Internal Revenue Agents and these statements were a part of the Commissioner's file. Witness Wilders had made no written statement to the agents. It is to be noted that the taxpayers did not appear before the Tax Court as witnesses to challenge any evidence offered by the Government, nor did they produce any other witnesses to testify in their behalf.

Taxpayers had procured the issuance of two subpoenas *duces tecum* addressed to the Regional Commissioner of Internal Revenue, one of which, as the Tax Court noted, demanded the production before the Tax Court of: (1) The complete 1949 and 1950 Revenue Agents' reports, including the confidential elements thereof; (2) all of the information from which it was determined that the petitioners understated their 1949 and 1950 income; (3) all affidavits and all statements or transcripts of statements, under oath or not, submitted or made by the petitioners, to any office or officer of the Internal Revenue with respect to their tax liabilities for the years 1949 and 1950; (4) transcript of statement of interview with William O'Dwyer, witness, held in Room 1007, Intelligence Unit, 253 Broadway, New York, N. Y., on March 28, 1951.

The other subpoena required the production of complete 1951 Revenue Agents' reports, including the confidential elements thereof; all of the information from which it was determined that the taxpayers understated their 1951 income; and all affidavits and all statements or transcripts of statements, under oath or not, submitted or made by the petitioners to any office or officer of the Internal Revenue with respect to their tax liabilities for the year 1951.

The Commissioner refused to comply with the requirements of the subpoenas and taxpayers made two motions before the Tax Court for orders directing compliance, which motions were overruled. In refusing to comply with

the subpoenas, Government counsel stated that, although declining to hand over the Government's files, he was not thereby making a blanket refusal to produce specific items. The Tax Court made it clear that its ruling was merely a "denial of the broad request * * * for all the papers and all the files relating to these cases", indicating that it would rule upon request for specific items when they became pertinent. Some of the items requested by taxpayers were made available by the Government. The Commissioner voluntarily produced William O'Dwyer's statement of March 28, 1951, containing an absolute denial of the receipt of $10,000.00 in the year 1949, the delivery of which sum to said taxpayer was the subject of the testimony of Crane and other witnesses. The Commissioner produced a statement of assets and liabilities which had been submitted by the taxpayers, and later voluntarily delivered to taxpayers' attorney the written statements of two of the Government's witnesses, namely, Crane and Dolan. Thus there remained in issue, in substance, only the Agents' reports and taxpayers' counsel made a specific demand therefor. The Tax Court refused to direct production upon the ground that taxpayers were not entitled to such documents merely upon the basis of a general claim that the determination of deficiencies were arbitrary and improperly motivated.

Following the denial of the motions to direct compliance with the subpoenas, taxpayers then rested their case and failed to produce any witnesses to testify concerning any of the issues. It is the contention of taxpayers that the denial of these motions amounted to a denial of constitutional due process and that relevant statutes and rules, including the Administrative Procedure Act, required production of such records for scrutiny by taxpayers and the reviewing tribunal.

In a colloquy between the Tax Court and counsel for taxpayers, counsel admitted that the determination of fact made by the Commissioner is one which the taxpayers

are obliged by law to refute, and further stated: "We had hoped that if the Government would present the record in toto and expose it here, that we might have something even much more sinister than that in writing and I respectfully submit if we see it, we will find it. * * * Your Honor, the only thing that I had in mind was this, that in these days when we have complaints with respect to taxation, would it not be a wholesome thing if for the first time the Government came forward and opened up their files to a taxpayer as they should? There is no reason why there should be any secrecy between a Government and its taxpayer. If they see fit to take taxes from him, at least they should show him the conditions under which they impose the taxation."

The Court stated: "This Court is not subject to the Administrative Procedure Act. We do not review in the same sense as other courts perhaps review actions of the Federal Communications Commission or some other federal agency. We do not review in that same manner the determinations of the Commissioner. This is a trial 'de novo' and the question before me is simply whether or not the deficiencies determined by the Commissioner are correct. I have no means whatever of bringing before me the entire record, so-called, as you describe it, that was before the Commissioner. In fact, there probably is no such record. When the Commissioner makes determination, he may have numerous documents before him. The determination may be made on the basis not only of those documents, but also on the basis of various conversations which may or may not be reduced to writing. And it would be wholly impractical for this Court to undertake to review what you describe as the record before the Commissioner. There is no such record in any technical sense."

Counsel for taxpayers then stated: "If Your Honor please, in view of Your Honor's ruling with respect to what we regard as the most important issue in this case, from a standpoint of civil rights, the Petitioner rests and will appeal in the event of an adverse ruling."

Applicability of Administrative Procedure Act

Taxpayers contend: That the determination of the Commissioner of Internal Revenue is subject to judicial review in accordance with the provisions of Section 10 of the A P A; that the Tax Court is a "reviewing court", within the meaning, and subject to the provisions of Section 10(e), (5 U. S. C. 1952 ed., Section 1009(e); c. 324, 60 Stat. 237, at 243-244); that the Tax Court must review the "whole record" of facts and circumstances upon which the Commissioner based his determination.

The provisions of the A P A must be read and construed together and we hold that the judicial review of the "whole record" mentioned in Sec. 10(e) envisages, in the case of adjudication, a review of the record made in cases wherein Sections 5, 7 and 8 of the Act (5 U. S. C. 1952 ed., Secs. 1004, 1006, 1007; 60 Stat. 237 at 239-240; 241-242) are applicable. Where these sections apply, the administrative agency is required to hold a formal hearing within a strict statutory framework and to make up a record of the testimony and exhibits introduced thereat, upon which record the agency must base its decision. This formal record is the subject of the review provided in Sec. 10. To hold that Sec. 10 applies to a determination of the Commissioner and that the Tax Court is a "reviewing court", within the meaning of that section, would be to hold that such determination is subject to the rigid requirements of Secs. 5, 7 and 8. Without a "record" to review, the provisions of Sec. 10(e) would be meaningless and thus inapplicable here.

It has been held that the Bureau of Internal Revenue is exempt from the requirements of Secs. 5, 7 and 8 of the A P A. *Cohen* v. *Commissioner*, 176 F. 2d 394 (10 Cir. 1949); *Kennedy Name Plate Co.* v. *Commissioner*, 170 F. 2d 196 (9 Cir. 1948). The Tax Court is given jurisdiction to redetermine the deficiency asserted by the Commissioner, and in doing so it is empowered to prescribe

rules of practice and procedure and is required to apply the rules of evidence applicable to non-jury trials in the United States Court of the District of Columbia and make findings of fact upon such evidence. (Secs. 6213, 7453 and 7459, Internal Revenue Code of 1954). The Tax Court thus reviews its decision only upon the evidence produced before it. The burden of proof rests upon the taxpayer, and a decision of the Tax Court based upon the failure to sustain such burden was upheld. *Fairmont Aluminum Co. v. Commissioner*, 22 T. C. 1377, affirmed 222 F. 2d 622 (4 Cir. 1955).

The Tax Court, rather than being a "reviewing court", within the meaning of Sec. 10(e) reviewing the "record", is a court in which the facts are triable de novo and the burden is upon the taxpayer to come forward with evidence showing the determination of deficiency to be erroneous. We agree that the Tax Court is not subject to the Administrative Procedure Act.

Motions to Compel Compliance with Subpoenas Duces Tecum

Having determined that the Tax Court was not required to review the "record" before the Commissioner, consideration is given to the subpoenas *duces tecum* and the denial by the Tax Court of motions to compel compliance therewith.

Certain specified documents and statements mentioned in the subpoenas were voluntarily produced by the Government as hereinbefore shown, leaving only the agents' reports and confidential information in issue. The material so produced may or may not have been pertinent to the inquiry before the Tax Court but, upon insistent assertions of pertinency by counsel for taxpayers, production was not refused.

Counsel for taxpayers concede that the Tax Court has no "discovery" jurisdiction. Referring to the demands for production as contained in the subpoenas, the Tax Court

said: "Although the foregoing appear to give some color of compliance with our Rule 44(c), requiring that the subpoena 'shall number, set forth separately, and describe adequately each item to be produced', it is plain, not only from item (2) but also from statements made by counsel during the course of the hearing as well as the accompanying affidavit of counsel, that petitioner was seeking to have 'the records and files of the respondent * * * produced and opened to inspection by the petitioner'."

The affidavit of counsel accompanying the motions to compel compliance contained scurrilous and scandalous accusations, portions of which are as follows: "* * * the representatives of the Internal Revenue Department are not interested in collecting taxes from petitioner, but in creating political capital out of its assessment and in using every instrumentality of the Government, including the Courts, to accomplish that purpose. * * * This may be called a tax case but in truth it is not. The Government may attempt to give it all the trappings of a tax proceeding, but it cannot escape the truth. Unless the curtain of secrecy, which the Government seeks to draw over its activities, is removed, the sham which led to this so-called tax case, will be seen in its true light. * * * Too often these days do we find people robbed of their employment, and robbed of their good name, by illegal, improper, distorted and often anonymous information which the Government Agencies do not believe but see fit to use for ulterior purpose. * * * 'We are horrified by the soviet example of the cult of the individual, and a Government run to suit personal ambitions."

What an indictment! Counsel for the Government moved to expunge the affidavit from the record, describing it as a malicious and vicious document completely unfounded in truth and in principle. Counsel for the Government stated "that if Mr. O'Dwyer has any facts which he thinks proves the allegations he has made therein, I think it is incumbent upon him to prove them before such a motion remains in the files of this Court". The motion to expunge

was denied and, although not called upon to do so, we volunteer the opinion that, in this particular, the Tax Court was in error. Such tactics on the part of counsel should not be overlooked or condoned under these circumstances where not one word of testimony was offered on taxpayers' behalf relative to these or any other matters.

Obviously, the use of the subpoenas was intended to aid taxpayer in conducting a fishing expedition and to raid Government confidential files for some purpose, as yet not clearly disclosed. Taxpayers had, or produced, no evidence which might tend to show that the Agents' reports or the Commissioner's files contained *no* facts which would support the determined deficiencies. Instead, they contented themselves with the broad, general and unsupported charge that the entire tax proceedings were motivated by improper political considerations, or worse.

In charging that the taxpayers were denied the constitutional right of due process arising from the Court's action in denying the motions to compel compliance, they rely on cases such as *Simmons* v. *United States*, 348 U. S. 397, and *Gonzales* v. *United States*, 348 U. S. 407, and the holdings of the Supreme Court that a Hearing Officer acting under the Selective Service Act could not rely upon a secret F. B. I. report which was not disclosed to the registrant. Such cases are inapposite here. The Tax Court's decision was not based upon any Revenue Agents' reports or the confidential portions thereof. The evidence upon which the Tax Court acted in determining unreported income for the year 1949 was voluntarily produced by the Government and is now before this Court. Arguments based on the alleged use of secret evidence are therefore plainly inapplicable and without foundation. Under the circumstances here presented, we perceive no error in the denial of motions to compel compliance with the subpoenas or requests made for the production of the Revenue Agents' reports.

Although acknowledging, as shown, the obligation on the part of taxpayers to refute the Commissioner's deter-

minations and thus admitting the presumption of correctness, taxpayers contend that, since the Government produced *some* testimony before the Tax Court, the presumption of correctness was waived. In support of this contention, they cite the following cases: *J. M. Perry & Co.* v. *C. I. R.*, 120 F. 2d 123 (9 Cir. 1941); *Manchester Board & Paper Co.* v. *C. I. R.*, 89 F. 2d 315 (4 Cir. 1937); *Crude Oil Corp. of America* v. *C. I. R.*, 161 F. 2d 809 (10 Cir. 1947); *Gillette's Estate* v. *C. I. R.*, 182 F. 2d 1010 (9 Cir. 1950); *Hemphill Schools* v. *C. I. R.*, 137 F. 2d 961 (9 Cir. 1943); and *New York Life Ins. Co.* v. *Gamer*, 303 U. S. 161 (1938).[1]

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[1] The Perry case holds that the determination of the Commissioner is presumptively correct, and, until the taxpayer proceeds with competent and relevant evidence to support his position, the determination of the Commissioner stands; further, that any finding which is inherent in the Commissioner's determination is also presumptively correct.

The Manchester case holds that the Commissioner's determination is presumptively correct; that the burden of proof rests on the taxpayer to prove it wrong; that the introduction of evidence tending to show the determining fact will abolish the presumption but that the taxpayer's evidence, so introduced, may itself destroy the taxpayer's theory and the presumption will remain.

The Crude Oil Corp. case holds that the presumption of correctness is one of law and not an inference of fact, disappearing when the taxpayer introduces evidence sufficient to sustain a contrary finding.

Gillette's Estate holds that the presumption of correctness does not constitute evidence and approves a quotation of the Supreme Court that unquestionably the burden of proof is on the taxpayer to show that the Commissioner's determination is invalid.

The Hemphill Schools case holds that once evidence is introduced by the taxpayer to show that the Commissioner's determination was wrong, the presumption disappears and the case must be decided wholly upon the evidence.

The New York Life case holds that the presumption under a policy that death was accidental is not evidence and may not be given weight as evidence, but disappears once there is competent evidence tending to show that death was suicidal and the case must be decided upon the evidence unaffected by the presumption.

An examination of the holdings in these cases forces us to reject them as authority for the asserted proposition. In fact, in some instances, taxpayers have taken words out of context and have supplied an introductory phrase which twists or distorts the meaning of the selected words. A brief analysis of the cited cases is set forth in footnote 1. By presenting testimony of witnesses, the Government did not waive the presumption of correctness.

Tax Court's Findings of Fact and Effect of Commissioner's Determination

Taxpayer, William O'Dwyer, in his written statement of March 28, 1951, which was produced by the Government at the trial, categorically denied the receipt of the $10,000.00 from Crane. On this sole question of fact, the Government offered before the Tax Court the testimony of Dolan, Crane and Wilders, but only after delivery to taxpayers' counsel of prior written statements of Dolan and Crane which were in the Commissioner's files.

The testimony of the three witnesses so presented is now reviewed. In 1949 William O'Dwyer was a candidate for re-election as Mayor of the City of New York. The Uniformed Firemen's Association of New York City (hereinafter referred to as UFA) was an organization of city firemen which, like most such organizations, was active in furthering the interests of its members and, at the time (1949), was interested in legislation relating to pensions for firemen. Having received assurance that O'Dwyer would give his support to such legislation, the UFA decided to lend its support to his candidacy, including a financial contribution.

John P. Crane was the President of the UFA and one Jerry Finkelstein was manager of O'Dwyer's campaign. In response to solicitation from Finkelstein for a contribution to the campaign, Crane promised that the UFA would make a contribution but that it would be made to O'Dwyer personally. At Finkelstein's request, it was agreed that he

might accompany Crane when the gift was made to O'Dwyer. Accordingly, some days later Crane, after directing Dolan, the Treasurer of the UFA, to withdraw $10,000.00 of the organization's funds from the bank, proceeded with this amount in cash to Gracie Mansion, the official residence of the Mayor of New York.

The trip to the Mayor's residence in uptown New York was made in an automobile owned and driven by another fireman, a friend of Crane's named Wilders. On the way to Gracie Mansion, they stopped to pick up Finkelstein according to their prearrangement. When the group arrived at the mansion, they found that the Mayor was preparing to go down town and, in fact, was on the porch adjusting his coat before getting into the automobile which was waiting for him. Crane and Finkelstein got out of their car and, while Finkelstein stopped to speak to an occupant of the car waiting for the Mayor, Crane went up on the porch where he handed O'Dwyer an envelope containing the $10,000.00 and told him that it represented the support which the firemen had promised. O'Dwyer expressed his thanks, walked back to the door of the mansion and handed the envelope to someone inside. As O'Dwyer came back after delivering the envelope inside the door, Finkelstein came up on the porch and engaged in some conversation with O'Dwyer which Crane did not overhear. Thereafter, Crane, Wilders and Finkelstein got in Wilders' car and returned down town.

The testimony of Crane is corroborated by Dolan as to the delivery by Dolan to Crane of the $10,000.00 of the UFA funds; and is corroborated by Wilders as to the trip up to Gracie Mansion. There was no evidence as to the disposition of the money after it was handed to some unidentified person inside the house. Although the Mayor's campaign manager, Finkelstein, was present, the money was not then and there delivered to him for use in the campaign. There was no showing that delivery was later made to anyone connected with the campaign or that the money was expended for political purposes.

No evidence was offered to deny, challenge or contradict the testimony of these witnesses. In its opinion, the Tax Court stated:

> "Petitioner's counsel subjected the witnesses to a thorough and vigorous cross-examination. We had ample occasion to observe the witnesses and, notwithstanding a few inconsequential inconsistencies in their testimony, we are convinced that they were telling the truth. We are fully satisfied that Crane paid over the $10,000.00 to the petitioner, as set forth in our findings. However, the evidence strongly supports the view that Crane intended the payment as a political or campaign contribution. If it were such and were in fact used for such purposes, then it would not constitute taxable income. On the other hand, if petitioner retained the money or diverted it to his own personal use, it would be taxable income to him. * * * Petitioner himself was the one person who could throw the most light on this matter. Yet he deliberately chose not to take the witness stand and subject himself to cross-examination. This is a circumstance that cannot be lightly ignored. The burden of proof was upon him, and his failure to meet it calls for the same result that was reached in Manson L. Reichert, supra, 19 T. C. at p. 1039."

Taxpayers' counsel contend that Crane's testimony was incredible; that Crane was looting the funds of the UFA; that there were inconsistencies in the testimony of Crane and Wilders; that the Court repeatedly curtailed cross-examination. Counsel were furnished with the prior written statement of Crane which was available to them for purposes of contradiction if his testimony appeared inconsistent wtih previous statements. There was no evidence to support the broad accusation of looting of funds. The inconsistencies in the testimony of Crane and Wilders were noted as minor by the Tax Court and, in its opinion,

the inconsistencies did not destroy the reliability of the testimony offered. The claim of curtailment of cross-examination is a plain misstatement. In fact, in several instances, upon the assurances of counsel that they would follow up to show materiality and pertinency, the Court permitted continued and extended cross-examination far beyond the scope of direct examination and as to matters apparently wholly unrelated to any issue. There was no later showing made and apparently no effort to follow up.

As the trier of facts, the Tax Court observed the witnesses carefully and, upon consideration of their testimony, found that they were truthful. The testimony of the Government witnesses was unrefuted. The facts were within the personal knowledge of William O'Dwyer and he was in a position to refute the testimony if it was untrue. His failure to do so necessarily gives rise to an inference that his testimony would not have been favorable to his own case. *Stoumen* v. *Commissioner*, 208 F. 2d 903 (3 Cir. 1953). The Tax Court had the opportunity to evaluate the testimony of the witnesses and determine their credibility. We are not prepared to hold that the findings of fact are clearly erroneous as we are not left with the definite and firm conviction that a mistake has been committed. The trial court's findings on questions of fact will not be reversed except for plain error. *Hodges* v. *Standard Oil Co. of New Jersey*, 123 F. 2d 362 (4 Cir. 1941); *Jordan* v. *Texas Co.*, 123 F. 2d 614 (4 Cir. 1941).

Having traced the money to O'Dwyer to be used for a definite and specific purpose, the burden was then upon O'Dwyer to show that it was so used if he would avoid the inclusion thereof in his taxable income. Implicit in the determination of the Commissioner (that the $10,000.00 was taxable income, based upon substantially the same evidence presented before the Tax Court, and in the face of an absolute denial by taxpayer O'Dwyer of the receipt of the money) is the further finding that the $10,000.00 was *not* used for political or campaign purposes. This determina-

tion is presumptively correct and the Tax Court was legally bound by it in the total absence of evidence to rebut the presumption. As the Tax Court said in Manson L. Reichert, supra, "Since petitioner denied receipt of the moneys in the first instance, there is no basis for any conclusion that he turned the money over to * * *, or anyone else, for use in the campaign * * * ".

Political Contribution

Taxpayers contend that, even if it be assumed that Crane made a campaign contribution to Mayor O'Dwyer, such gift did not constitute receipt of taxable income under the pertinent provisions of the Revenue Act in force in 1949.[2]

During the tax year 1949, there was in effect Revenue Ruling I. T. 3276, reported in Cum. Bul., 1939-1, Part I,

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[2] Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) [As amended by Sec. 1, Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency, or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * *

(3) *Gifts, bequests, devises, and inheritances.*—The value of property acquired by gift, bequest, devise, or inheritance. * * *

p. 108.[3] This Ruling continued in effect until 1954, when it was purportedly "modified" by Rev. Rul. 54-80, 1954-1, Cum. Bul., p. 11.[4]

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[3] "Advice is requested whether (1) contributions to political organizations are allowable deductions in the donor's Federal income tax return, and whether (2) political gifts or donations to individuals or to political organizations are subject to Federal Income Tax.

"With respect to the first inquiry, it is held that contributions to a political organization are not proper deductions in the donor's Federal income tax return, there being no provision in the Revenue Act of 1938 which allows such deductions.

"With respect to the second inquiry, it is held that a political gift received by an individual or by a political organization is not taxable income to the recipient."

[4] "Rev. Rul. 54-80, 1954-1 Cum. Bull. 11:

"Advice is requested whether that part of the political contributions received by a political organization or an individual seeking political office which is diverted to the personal use of the candidate or other individual constitutes taxable income to such candidate or other individual.

"Contributions to political organizations are customarily made with the intent and understanding that they be used for the expenses of a political campaign or for some similar purpose. Such contributions are not deductible for Federal income tax purposes by the donor. See I. T. 3276, C. B. 1939-1 (Part 1), 108.

"Where a political gift is received by an individual or a political organization and it is held or used for the purposes intended, i.e., for present or future expenses of a political campaign or for some similar purpose, it is not taxable income to the recipient. See I. T. 3276, supra. However, any amount diverted from the channel of campaign activities and used by a candidate or other individual for personal use constitutes taxable income to such candidate or other individual for the year in which the funds are so diverted. For example, a candidate seeking political office receives contributions totaling $1,000 from individuals and organizations for use in his campaign for election to such office. During the campaign the candidate expends $600 of the contributed funds for campaign purposes. He uses the balance of the campaign funds to reduce the mortgage on his personal residence. In such a case the candidate will be required to include in his taxable income the $400 which represents the portion of the fund which he diverted to his personal use. Such amount will be includible in taxable income in the year in which so diverted."

"I. T. 3276, supra, is modified to the extent that it is inconsistent with the views expressed herein."

Taxpayers argue: That a "political contribution", or a "campaign contribution", was a mere gift and thus excluded from gross income under the then applicable provisions of the income tax laws; that nothing in the statutes, regulations or rulings in effect in 1949 justified the treatment, for tax purposes, of a gift or contribution on any different basis merely because of its characterization by the word "political" or the word "campaign"; that there was no duty in 1949 on taxpayers to show the disposition of the campaign contribution; that the 1954 purported modification of Rev. Rul. I. T. 3276 is to the effect that the statutory exclusion of such gift from gross income would only be recognized where the gift is used or held for campaign expenses, and that the only part "diverted" to the personal use of the candidate constitutes taxable income; that the modified ruling of 1954 had no retroactive effect, was contrary to existing 1949 laws and interpretations and was prospective only.

Section 22(a) of the Internal Revenue Code of 1939 defines gross income in the broadest terms and includes gains, profits and income "derived from any source whatever". That language, as the Supreme Court has stated, was used by Congress in order to exert the full measure of the taxing power. *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, at 429, and cases cited.

Prior to Rev. Rul. 54-80, the Tax Court had decided *Reichert* v. *Commissioner*, 19 T. C. 1027 (March 1953), affirmed on other grounds 214 F. 2d 19 (7 Cir.), cert. den. 348 U. S. 909. The Tax Court found, as fact, that Reichert received over $1500.00 as contributions to political campaign funds, the receipt of the money having been categorically denied by Reichert. As hereinbefore shown, the Court concluded that there was no basis for any conclusion that Reichert turned the money over to anyone for use in the campaign since he had denied the receipt of the money

in the first instance and the inclusion of the money, so received, in Reichert's unreported income was sustained "for failure of proof".

Earlier, in *Paschen v. United States*, 70 F. 2d 491, 500 (7 Cir. 1934), involving income tax prosecution, there was evidence before the trial court that Paschen had received contributions for political campaign purposes. The trial judge offered the defendant an opportunity to show, if he could, that such contributions were paid out and did not ultimately remain with him, stating that, upon such showing, the contributions would not represent income to Paschen. The Court of Appeals, by inference, indicated approval of the action of the trial court even though the precise point was not presented on appeal.

We reach the conclusion that Rev. Rul. 54-80 was declaratory of judicial interpretation of existing law and that it supplemented and amplified I. T. 3276, supra, notwithstanding the use of the word "modified". The two rulings are not necessarily inconsistent. I. T. 3276 did not purport to state the result if the recipient of a political contribution diverted it to his personal use; that sequel was supplied by Rev. Rul. 54-80. At the time of the transaction in 1949, taxpayers could not have relied upon any judicial or administrative decision which would justify the belief that the diversion of a political contribution to personal use would not have constituted taxable income.

Disallowance of Claimed Deductions—Unreimbursed Ambassadorial Expenses

Wliliam O'Dwyer claimed the right to deduct from gross income, as ordinary and necessary business expenses, or as expenses incurred in the production of income under Sec. 23(a)(1)(A), or (a)(2) of the Internal Revenue

Code of 1939,[5] certain expenses claimed to have been necessarily incurred in discharge of ambassadorial duties.

For the period August 30 to December 31, 1950, claimed total expenditures amounted to $7,678.63 and for 1951 $28,390.76. Amounts received during those years as reimbursed from the Department of State for ambassadorial activities in the sums of $542.69 and $10,124.60 were deducted from these totals, as well as estimated amounts for personal expenses in the sum of $1,000.00 for 1950 and $6,000.00 for 1951. This left a balance claimed by taxpayers, as expenses deductible from income, of $6,135.94 for 1950 and $12,266.16 for 1951.

The Tax Court found that the evidence submitted to it as to the deductibility of the various expenditures rendered it practically impossible, in many instances, to determine whether a particular expenditure was personal or related to taxpayer's activities as Ambassador. It therefore applied the rule of *Cohan* v. *Commissioner*, 39 F. 2d 540 (2 Cir. 1930). In that case the Court of Appeals required the Board of Tax Appeals to review total disallowance of claimed deductions for business expenses incurred in travel and entertainment (unsubstantiated by books or

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[5] SEC. 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions:

"(a) [as amended by Sec. 121(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

"(1) *Trade or business expenses.*—

"(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * * .

* * *

"(2) *Non-trade or non-business expenses.*—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income." (26 U. S. C. 1952 ed., Sec. 23.)

records), with directions that the Board should make as close an approximation as possible, "bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making". The Court further said: "It is not fatal that the result will inevitably be speculative; many important decisions must be such."

The evidence before the Tax Court of expenditures consisted of taxpayers' accountants' work papers for the year 1951 and a stipulation as to expenditures made in 1950. An examination of these documents shows not only that they are not original records but that they are merely listings of total amounts expended under various categories, such as cigars, cigarettes, wines and liquors, food and household, gifts and medals, telephone and telegraph, flowers, furnishings, entertainment, etc. That taxpayers recognized as personal expenses some of the amounts listed under these various categories is shown by their arbitrary subtraction of estimated amounts of $1,000.00 for 1950 and $6,000.00 for 1951. These estimates made by the accountants, in the absence of testimony or other evidence tending to establish their correctness or to substantiate the claimed expense deductions, could not be binding on the Tax Court. Even though the failure to substantiate would have warranted a disallowance of deductions of any amounts in excess of those recognized by the Commissioner, *Burnet* v. *Houston*, 283 U. S. 223, in applying the ameliorating rule of the Cohan case, the Tax Court fixed deductible expenses at $2500.00 for 1950 and $18,000.00 for 1951, these amounts being in excess of the amounts allowed by the Commissioner. After deducting therefrom the amounts received as reimbursement, taxpayers were allowed a deduction of $1,957.31 for 1950 and $7,875.50 for 1951.

The taxpayers cannot complain of the approximation made by the Tax Court under the Cohan rule in the light of their failure to produce necessary supporting evidence establishing rights to deductions. *Finley* v. *Commissioner*,

255 F. 2d 128 (10 Cir. 1958); *Baumgardner* v. *Commissioner*, 251 F. 2d 311 (9 Cir. 1957); see also *Harris* v. *Commissioner*, 174 F. 2d 70 (4 Cir. 1949). We cannot hold, on the record here presented, that these determinations by the Tax Court were clearly erroneous.

Unexplained Bank Deposit

The evidence before the Tax Court on this point consisted of a ledger sheet of the Chase National Bank of the City of New York showing the deposit of $1500.00 on July 16, 1951, to the credit of a joint account in the name of Sloan O'Dwyer and the name of her mother, the address of both depositors being given as Embassy Residence, Embassy of the United States, Mexico D. F. Mexico; a deposit slip in the individual name of Sloan O'Dwyer dated July 8, 1951, indicating that the amount deposited was evidenced by a check. The fact that the deposit slip was dated eight days before the credit to the account may well indicate that the check and the deposit slip were mailed from Mexico.

Taxpayers argue that an isolated bank deposit, standing alone, is not enough to show the receipt of income and charge that the determination of the Commissioner that the $1500.00 deposit represented taxable income was arbitrary and capricious.

An examination of the ledger sheet discloses another deposit on July 20, 1951, in the amount of $739.97 to the joint account of Sloan O'Dwyer and her mother. There is nothing in the record to indicate the source of either of these deposits but it is significant that the Commissioner found that the $1500.00 only constituted taxable income. It may be that the Commissioner had evidence as to the source and nature of the $739.97 deposit and no evidence whatever as to the source and nature of the $1500.00 deposit. The record is silent on this point.

The Tax Court had no information or evidence before it as to the source or nature of either deposit, but it was confronted with the presumption of correctness attaching to the Commissioner's determination that this particular deposit represented taxable income. The Tax Court stated: "The petitioners have not sustained their burden of overcoming this presumption. They introduced no evidence or testimony. They seemed content to rely upon the fact that the $1500 was deposited in a joint bank account. * * * In the absence of some evidence that the $1500 did not represent taxable income, we must sustain the respondent's determination in this regard."

All taxpayers had to do in order to overcome the presumption of correctness was to make some reasonable explanation as to the source and nature of the deposit in question. The presumption existed, the Commissioner's determination was prima facie correct and the burden was upon the taxpayers in the Tax Court to overcome this presumption. See *Hoefle* v. *Commissioner*, 114 F. 2d 713 (6 Cir. 1940).

For the reasons herein stated, the decision of the Tax Court is, in all respects,

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 220

WILLIAM O'DWYER AND SLOAN O'DWYER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 7a–18a)[1] are reported at 28 T.C. 698. The opinion of the court of appeals (Pet. App. 35–56) is reported at 266 F. 2d 575.

JURISDICTION

The judgment of the court of appeals was entered April 21, 1959. The petition for a writ of certiorari was filed July 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Record references are to the Appendix to the taxpayer's brief below, copies of which have been filed with this Court.

QUESTIONS PRESENTED

1. Whether the Tax Court was correct in determining that the taxpayer[2] received $10,000 in taxable income in the year 1949, where the Commissioner adduced evidence establishing the receipt of such income and the taxpayer offered no proof to the contrary.

2. Whether the Tax Court properly determined the amounts of the taxpayer's deductible business expenses for the years 1950 and 1951.

3. Whether the Tax Court was correct in determining that taxpayer Sloan O'Dwyer received $1,500 in taxable income in the year 1951, where the Commissioner adduced evidence establishing the receipt of such income and the taxpayer offered no proof to the contrary.

4. Whether the Tax Court properly denied the taxpayer's demand for production of all of the Commissioner's files, including the confidential revenue agents' reports, relating to the tax deficiencies asserted against him.

STATUTES AND RULING INVOLVED

Sections 22(a) and (b)(3), 23(a)(1)(A), and 23(a)(2) of the Internal Revenue Code of 1939 and Rev. Rul. 54–80 are set forth in the Appendix, *infra*, pp. 20–22.

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[2] Except for one item of income in the year 1951, taxpayer Sloan O'Dwyer is a party solely by reason of having filed joint returns with her husband. Accordingly, the taxpayer William O'Dwyer will be referred to as the taxpayer unless otherwise stated.

STATEMENT

The taxpayers filed petitions with the Tax Court for redetermination of deficiencies found by the Commissioner in their income tax for the years 1949, 1950, and 1951, totaling approximately $20,000 (R. 8a). As a result of the proceedings in the Tax Court, the deficiencies for the three years were redetermined as $8,242.12 (R. 18a–19a). On petitions for review, the court of appeals affirmed (Pet. 56).

The facts as found by the Tax Court may be briefly summarized as follows:

1. The taxpayer, William O'Dwyer, was Mayor of the City of New York from November 1945, until he resigned in August 1950 (R. 9a). In the early part of 1949 relations between the taxpayer and the Uniformed Firemen's Association of New York had become strained as the result of a resolution adopted by the latter stating that it would not support the taxpayer for reelection unless he lived up to a promise to support legislation involving firemen's salaries. Subsequently, however, John P. Crane, the president of the Association, decided to heal these differences and to give the taxpayer $10,000 to evidence the support of the Firemen's Association. Terrance Dolan, the treasurer of the Association had withdrawn $5,000 from the Association's bank account on September 26, 1949, and this money was on hand on October 6, 1949. Crane informed Dolan that he wanted a sum of $10,000. Accordingly, on October 6, 1949, Dolan withdrew an additional $5,000 and gave the two sums to Crane in two "standard-size" white envelopes. After Dolan took the $10,000 in two packages out of

his safe and gave it to Crane, the latter placed it in a second safe in the Association's office and instructed the girl who had the combination to the safe to report to work early on the morning of October 10, 1949, in order that he could get the money out of the safe (R. 9a–10a).

Some time before these events, Crane had met the taxpayer on the steps of City Hall in New York and had told him that he wanted to see him. The taxpayer had told Crane to "drop up" to Gracie Mansion, the official residence of the Mayor of New York. On the morning of Monday, October 10, 1949, Crane went to the office of the Firemen's Association at about 8:30 A.M. Upon arrival at the office Crane took the money from the safe, broke open the two packages and placed the money in a brown manila envelope (R. 10a). Crane then drove his car to a fire station on 67th Street in New York where he met Victor Wilders, a fireman stationed there who was to see to it that Crane's car would be taken to Mezey Motors for servicing. After leaving the garage, Wilders offered to drive Crane wherever he wished to go. Crane directed Wilders to drive to a building at 96th Street and Park Avenue in New York City to meet Jerry Finkelstein, who was the manager of the taxpayer's campaign for reelection as Mayor of New York. Crane had previously promised Finkelstein that when he went to see taxpayer with a contribution for the campaign he would allow Finkelstein "to come along." On the way to 96th Street and Park Avenue, Wilders had to make a sudden stop at a traffic light. This caused the flap

of the envelope on Crane's lap to open, and Wilders saw money in the envelope (R. 10a–11a).

Upon arrival at the gate of Gracie Mansion, a policeman stopped the car, put his head in the door, and, upon seeing Finkelstein, told Wilders to go ahead. Crane got out of the car and went up the steps of Gracie Mansion where he met the taxpayer coming out the front door. Crane handed the manila envelope containing the $10,000 to the taxpayer who thanked him, walked back to the door, and tossed it to someone inside the house. Finkelstein then came up the steps and spoke to taxpayer on the porch. Taxpayer, Crane, and Finkelstein came down the steps together. Crane and Finkelstein entered Wilders' car, and they drove off (R. 11a). The Commissioner included the $10,000 amount in the taxable income of the taxpayer for 1949 (R. 11a).

2. After the taxpayer was nominated as Ambassador to the Republic of Mexico on August 30, 1950, he and his wife kept a record of the expenditures made by them during the remainder of 1950 and the year 1951. Some were ordinary and necessary expenses connected with the taxpayer's activities as ambassador and some were personal. This record listed the dates and gave some indication of the nature of the various expenditures, but in many instances it did not contain sufficient information from which it could be determined whether a particular expenditure was of a business or personal nature. The taxpayer and his wife were in Mexico for approximately 33 days during 1950 and their expenditures during that period were listed as "Mexican Expenses." The total of all

expenditures made by the taxpayer and his wife from August 30, 1950, to December 31, 1950, was $7,678.63; their total expenditures for 1951 amounted to $28,390.76. The taxpayer received reimbursements from the Department of State for certain expenses incurred by him in connection with his duties as ambassador. He received $542.69 as such reimbursement in 1950 and $10,124.60 in 1951. In their tax returns for these years, the taxpayer and his wife claimed deductions of $6,135.94 and $12,266.26 respectively for "expenses in connection with earning income". These amounts were arrived at by deducting from the total expenditures in each year the sums received as reimbursement together with an estimated amount for personal expenses. The amount estimated for such personal expenses for "one month" in 1950 was $1,000, and the amount estimated for 1951 was $6,000. The Commissioner originally disallowed the entire amount of $6,135.94 claimed as a deduction for 1950 and $10,000 of the $12,266.26 claimed for the year 1951 "for lack of substantiation" (R. 11a–12a).

3. On July 8, 1951, taxpayer Sloan O'Dwyer deposited $1,500 in a joint bank account maintained under her name and that of her mother, Eleanora Young, with the Chase National Bank of the City of New York. The Commissioner included this amount in the taxable income of the taxpayers for 1951 (R. 12a).

4. At the opening of the hearing before the Tax Court, the taxpayer moved for an order directing compliance with a subpoena *duces tecum* addressed

to the Regional Commissioner of Internal Revenue which in substance directed that official to produce all of his records and files, including the confidential revenue agents' reports, which were used as a basis for determining the deficiencies. The Government voluntarily produced some of the items requested by the subpoena, but refused to surrender the confidential revenue agents' reports. The Tax Court held that the taxpayer was not entitled to those reports merely on the basis of a general claim that the deficiencies were arbitrary and the proceedings improperly motivated. As a result of this ruling, the taxpayer refused to present any further evidence (R. 13a–15a).

The Tax Court held, with respect to the payment of $10,000 in 1949, that, although a political contribution is not taxable income to the recipient, if the recipient diverts the money to his personal use it becomes taxable income to him. In the absence of evidence from the taxpayer, the Tax Court felt compelled to conclude that he had not met the burden of proof imposed upon him to show that the sum of $10,000 paid in 1949 was not diverted to his personal use. As to the business deductions claimed for 1950 and 1951, the Commissioner in his brief before the Tax Court conceded the deductibility of $1,002.31 for 1950 and $5,212.63 for 1951. The Tax Court found that the evidence submitted to it as to the deductibility of the various expenditures rendered it difficult, if not impossible, in many instances to determine whether a particular expenditure was per-

sonal or related to the taxpayer's activities as ambassador. It therefore applied the rule of *Cohan* v. *Commissioner,* 39 F. 2d 540 (C.A. 2), and estimated that the amounts attributable to the taxpayer's duties as ambassador were $2,500 for 1950 and $18,000 for 1951. After deducting from these amounts the sums taxpayer received as reimbursement, the Tax Court concluded that the taxpayer was entitled to a deduction of $1,957.31 for 1950 and $7,875.50 for 1951. With respect to the remaining item, namely the deposit of $1,500 by taxpayer Sloan O'Dwyer in 1951, this amount had originally been included in additional income underlying a deficiency asserted by the Commissioner for that year of $15,656.48. Prior to the trial, however, the Commissioner conceded that $14,156.48 was not taxable income to either taxpayer, which left in issue only the amount of $1,500. The taxpayer contended that this concession by the Commissioner destroyed any presumption of correctness as to such $1,500. The Tax Court found such contention to be without merit and held that the burden of proof was on taxpayers with respect to the $1,500. Taxpayer Sloan O'Dwyer having failed to come forward with any explanation for this item, it was held that the sum of $1,500 was properly included in taxable income for 1951 (R. 13a–18a).

The court of appeals in a lengthy opinion affirmed the decisions of the Tax Court on each of the issues litigated and concluded that the deficiences as redetermined were proper in all respects and that the

taxpayer had not been denied any of the procedural rights to which he was entitled (Pet. App. 35–56).

ARGUMENT

This case presents a variety of issues which involve the application of settled principles of tax law and most of which turn upon disputed questions of fact. On none of these issues is there any conflict of decisions which can be relied upon as the basis for a grant of certiorari, nor is there any substantial question of law which would merit review by this Court.

1. Taxpayer attacks the finding of the Tax Court that the taxpayer received the $10,000 from Crane in 1949 on the grounds that this finding was not supported by the evidence (Pet. 5–8, 9–10) and was not approved by the court of appeals (Pet. 11). In fact, the court of appeals determined that the Tax Court's findings were not clearly erroneous, refused to reverse such findings in the face of taxpayer's arguments, and affirmed the judgment in all respects. The validity of such findings, affirmed by the court of appeals, does not present an issue calling for the exercise of this Court's certiorari jurisdiction. *Corn Products Co.* v. *Commissioner*, 350 U.S. 46; *Comstock* v. *Group of Investors*, 335 U.S. 211.

The evidence introduced by the Commissioner, which was summarized in the Statement, *supra*, pp. 3–5, clearly supports the conclusion of the Tax Court that the taxpayer received the $10,000. Nevertheless, the taxpayer refused to testify or present any evi-

dence in his own behalf,[3] but instead contented himself with an attack upon the credibility of the Commissioner's witnesses. The Tax Court, which allowed thorough cross-examination, carefully considered the testimony of these witnesses and concluded that their testimony represented the truth (R. 13a; Pet App. 47-48).[4] The court of appeals, noting that the testimony of these witnesses was unrefuted, that the taxpayer was in a position to refute such testimony as untrue, and that his failure to offer such testimony gave rise to an inference that his testimony would have been unfavorable to his case (*Stoumen* v. *Commissioner*, 208 F. 2d

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[3] Although the taxpayer asserts (Pet. 9, 22) that he placed in evidence his own sworn statement denying the facts testified to by Crane and others, this statement was admitted in evidence only for the purpose of showing that it was before the Commissioner when he made his determination (Brief of Commissioner in the court of appeals, p. 54). The petitioner also says (Pet. 9, 22) that his net-worth statement was introduced in evidence. This statement was, of course, irrelevant to any of the issues, since the case was not tried on a net-worth theory. The only relevant evidence which petitioner introduced was a stipulation as to his expenditures in 1950 and a listing of expenses for 1951, both of which related to the issue of deductible expenses (Pet. App. 54).

[4] The taxpayer asserts (Pet. 9) that Finkelstein contradicted under oath the testimony of the Commissioner's witnesses. There is no evidence, however, in the record, as to such denials by Finkelstein; the taxpayer refers only to questions by his counsel in cross-examining Crane as to whether Crane knew that Finkelstein had so testified in another court (R. 130a-131a). These questions do not, of course, constitute evidence. The taxpayer further claims (Pet. 6-8) inconsistencies in the testimony of Crane, Dolan, and Wilders. The Tax Court, however, found that these inconsistencies were "inconsequential" (R. 13a).

903 (C.A. 3)), concluded that the findings were not clearly erroneous.

As an alternative to his attack on the findings, the taxpayer seeks (Pet. 11–18) to raise an issue which he first argued in the court of appeals, namely, that, even if the $10,000 payment was received by him, it could not be considered taxable income since a gift does not constitute taxable income. The evidence, however, fails to support this contention. The Commissioner produced evidence in the Tax Court that the payment of $10,000 was delivered to the taxpayer personally and in the immediate presence of his campaign manager by the unusual means of a payment in cash. It was incumbent upon the taxpayer to establish by competent proof that this money was received and used as a genuine campaign contribution, and thus did not constitute income to the taxpayer.

Section 22(a) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 20) defines income in the broadest terms and includes gains, profits, and income "derived from any source whatever." As this Court has held, that language was used by Congress in order to assert the full measure of the taxing power. *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426. Consistent with this concept, a political contribution represents taxable income to the recipient if diverted by him to his personal use or benefit. This

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There is no basis for the taxpayer's assertion (Pet. 11) that the decision below raises constitutional questions as to the validity of the statute under the Sixteenth Amendment. The issue is whether the payment to the taxpayer in fact constituted taxable income or a non-taxable gift, not whether Congress has purported to tax gifts.

is the view which has been taken both by the Commissioner and by the courts. In I.T. 3276, 1939-1 Cum. Bull. 108, the Commissioner ruled that a political gift does not constitute taxable income to the recipient. In Rev. Rul. 54-80, 1954-1 Cum. Bull. 11 (Appendix, *infra*, pp. 21-22), the Commissioner supplemented this ruling by declaring that if the recipient diverts a political contribution to his personal use or benefit it becomes taxable income to him. The Tax Court had previously come to the same conclusion in *Reichert* v. *Commissioner*, 19 T.C. 1027, affirmed on other grounds, 214 F. 2d 19 (C.A. 7), certiorari denied, 348 U.S. 909, and the Court of Appeals for the Seventh Circuit had likewise indicated some years earlier in *Paschen* v. *United States*, 70 F. 2d 491, 500, that campaign contributions would not constitute taxable income only if a recipient could show that they were paid out for campaign purposes and were not retained by him for personal use.

The rationale of these interpretations and decisions is clear. If a campaign contribution is to be considered a gift, it is necessarily a conditional gift in that the money is given with the express or implied limitation that it be used for campaign purposes. If the recipient diverts the funds to his personal use, the purpose of the gift has been frustrated and the conditions breached. It is settled that where a gift is made on condition that it be used for specified purposes, but it is not used for the purposes specified, the donor is entitled to rescind the gift and to demand the return of the funds given. *Herman* v. *Brooklyn Savings Bank*, 196 App. Div. 269, 187 N.Y.

Supp. 738. Thus, a recipient who diverts to his personal use funds given to him for campaign purposes has converted such funds and is chargeable with taxable income.[6]

2. The taxpayer asserts (Pet. 30–32) that the Tax Court erred in disallowing his claimed deductions for 1950 and 1951 under Section 23 (a)(1)(A) or (a)(2) of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 20–21). Inasmuch as the evidence submitted by the taxpayer on this issue consisted only of listings of total amounts expended under various categories such as cigars and cigarettes, wines and liquors, food and household, gifts and medals, telephone and telegraph, flowers, furnishings, and entertainment (Pet. App. 54), it is manifest that the Tax Court could not be certain that the entire amounts claimed were deductible. In fact, the taxpayer conceded that not all of these sums were deductible for he himself subtracted $1,000 in 1950 and $6,000 in 1951 as personal expenditures (R. 12a). Since the taxpayer failed to substantiate these deductions, the Tax Court would have been warranted in disallowing them entirely. *Burnet* v. *Houston*, 283 U.S. 223. Instead, it applied the rule of *Cohan* v. *Commissioner*, 39 F. 2d 540 (C.A. 2),[7] and made a reasonable estimate.

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[6] The courts have repeatedly held, in a variety of contexts, that funds wrongfully acquired constitute taxable income to the recipient. See, *e.g.*, *Rutkin* v. *United States*, 343 U.S. 130; *Briggs* v. *United States*, 214 F. 2d 619 (C.A. 4), certiorari denied, 348 U.S. 864.

[7] For the computations of the Tax Court, see *supra*, pp. 7–8. In *Cohan*, Judge Learned Hand stated that "the Board [of Tax Appeals] should make as close an approximation as it

3. The taxpayer contends (Pet. 33–34) that the Commissioner improperly determined as income an unexplained deposit of $1,500 made by taxpayer Sloan O'Dwyer in 1951 to the credit of a joint account which she maintained with her mother in a New York bank. The Commissioner introduced evidence of a deposit to the account of the taxpayer in a New York bank, forwarded by her from Mexico. Nevertheless, the taxpayer wholly failed to present any evidence as to such deposit in order to meet the burden of proof resulting from the Commissioner's notice of deficiency. In the absence of such evidence, it was properly held to constitute taxable income. *Halle* v. *Commissioner*, 175 F. 2d 500 (C.A. 2), certiorari denied, 338 U.S. 949; *Hoefle* v. *Commissioner*, 114 F. 2d 713 (C.A. 6); *Boyett* v. *Commissioner*, 204 F. 2d 205 (C.A. 5); *Doll* v. *Glenn*, 231 F. 2d 186 (C.A. 6). See also *Greenfeld* v. *Commissioner*, 165 F. 2d 318 (C.A. 4).

The taxpayer appears to argue (Pet. 34) that this item cannot constitute taxable income to her because it was deposited to the credit of a joint account which she maintained with her mother. The deposit, however, was made by her and not by her mother. Moreover, since she had an undivided interest in the account which was subject to her withdrawal (New York Banking Law, Sec. 134 (4 McKinney's Consolidated Laws of New York (1950), Sec. 134)) she cannot maintain that the funds represented by the deposit belonged to her mother rather than to herself.

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can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making." 39 F. 2d at 544.

4. The taxpayer claims (Pet. 18–26) that the refusal of the Tax Court to enforce subpoenas requiring the Commissioner to produce confidential reports of revenue agents[*] constituted a denial of due process. This argument is based upon the erroneous premise that the Tax Court, in redetermining the deficiency asserted by the Commissioner, must review the files of the Commissioner and evaluate the evidence and conclusions upon which the Commissioner's determination of deficiency was based. In redetermining the deficiency asserted by the Commissioner, the Tax Court is required to apply the rules of evidence applicable to non-jury trials in the District Court for the District of Columbia and to make findings of fact upon such evidence. Sections 7453 and 7459(b), Internal Revenue Code of 1954 (26 U.S.C. 1952 ed., Supp. V, Secs. 7453, 7459(b)). The Tax Court renders its decision only upon the evidence produced before it with the burden of proof resting upon the taxpayer. *Fairmont Aluminum Co.* v. *Commissioner,* 22 T.C. 1377, affirmed, 222 F. 2d 622 (C.A. 4); *379 Madison Avenue* v. *Commissioner,* 60 F. 2d 68 (C.A. 2). If the taxpayer adduces evidence showing the deficiency to be erroneous, the burden of going forward with evidence to support the deficiency (but not the burden of proof) shifts to the Commissioner. But the Commissioner cannot support that deficiency by producing his agents' reports for they would be clearly inadmissible as hearsay.

[*] At the request of taxpayer's counsel, the Government did produce various items including the statements of the taxpayer, Crane, and Dolan (Pet. App. 38).

The taxpayer rests his due process argument (Pet. 23–24) upon *Simmons* v. *United States* 348 U.S. 397, and *Gonzales* v. *United States*, 348 U.S. 407. Those cases, however, as the court of appeals noted (Pet. App. 43), are wholly inapplicable to the present situation. They involved a practice under which hearing officers operating under the Selective Service Act relied upon secret F.B.I. reports which were not disclosed to the registrant. No use of secret evidence has been made by the Tax Court. The evidence upon which its findings and decision are based is that contained in the record before this Court. No claim of a denial of due process can be premised upon the erroneous assumption that the confidential revenue agents' reports were made available to the Tax Court but not to the taxpayer.

The taxpayer further asserts (Pet. 19–22) that he was entitled to inspect the revenue agents' reports in order to demonstrate that the Commissioner's deficiency determination was arbitrarily made. He cites, however, no authority which would support the proposition that a general unsupported allegation that the deficiency determination was arbitrarily made creates a right to inspect the Commissioner's confidential files in order to buttress such an allegation. In *Helvering* v. *Taylor*, 293 U.S. 507, as well as in the other cases which the taxpayer cites (Pet. 19), the taxpayer had produced evidence that the determination was arbitrarily made.[9] Here the taxpayer

[9] Moreover, in *Taylor*, this Court merely held that, where a taxpayer has adduced evidence that a deficiency determination is erroneous, he need not also prove the correct amount of tax due as in the case of a refund suit. Similarly, in *Blair* v. *Oesterlein Co.*, 275 U.S. 220 (Pet. 20), a wholly different situation was presented. That case involved excess profits taxes for the years 1918, 1919, and 1920, and the Commissioner in

presented no evidence in the Tax Court which would tend to show that the Commissioner's files contained no facts which would support the deficiency asserted. He simply made the charge that the deficiency was arbitrary and motivated by improper considerations, as he does now (Pet. 8–9),[10] and, having made that charge, he maintained that he was entitled to see all of the Commissioner's files in order to support it. Since the Commissioner produced in the Tax Court the testimony of three witnesses concerning the payment of $10,000 to the taxpayer in 1949 (Pet. App. 45), and several documents supporting the $1,500 bank deposit in 1951 (Pet. App. 55), it has become obvious that the Commissioner's files did contain evidence to support the deficiency determination.

Lastly, the taxpayer asserts (Pet. 26–29) that he was entitled to inspect the confidential reports of the revenue agents because under Section 10(e) of the Administrative Procedure Act, c. 324, 60 Stat. 237 (5 U.S.C. 1009(e)), the Tax Court is a "reviewing

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computing the tax was required by Section 328 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, to compare the taxpayer with other corporations which were similarly circumstanced with respect to gross and net income, proceeds, capital, and other relevant facts. In view of the fact that the statutory tax computation rested upon a comparison of taxpayer with twelve other corporations, it was necessary for the taxpayer to have the returns of these corporations in order that he might have the opportunity to show that they were not similarly circumstanced. Even in that case, however, the Court did not order production of any revenue agents' reports, but merely the returns of the other corporations.

[10] This assertion, which taxpayer also made in the Tax Court and court of appeals, was condemned in vigorous terms by the court of appeals as unsupported (Pet. App. 42–43).

court," and consequently is required to review the files of the administrative agency involved, *i.e.*, the Internal Revenue Service. The Tax Court, however, is neither an administrative agency within the meaning of the Administrative Procedure Act (*Kennedy Name Plate Co.* v. *Commissioner*, 170 F. 2d 196 (C.A. 9); *Cohen* v. *Commissioner*, 176 F. 2d 394 (C.A. 10)), nor is it a reviewing court under that Act. Instead, it is the Tax Court's decision which is subject to review by a court of appeals, and it is the latter which is the "reviewing court." *Lincoln Electric Co.* v. *Commissioner*, 162 F. 2d 379 (C.A. 6).

Determinations of the Commissioner, which are subject to a trial *de novo* in the Tax Court, are not the type of determinations required by Sections 5, 7, and 8 of the Act (5 U.S.C. 1004, 1006, 1007) to be made only after a hearing on the basis of a record; rather they are exempted from the provisions of the Act because a subsequent hearing is available in the Tax Court under the provisions of the Internal Revenue Code. See S. Doc. No. 248, 79th Cong., 2d Sess., pp. 22, 214, 278. Since the Commissioner is not required to hold a hearing, the record here originated in the Tax Court in the form of evidence adduced before it. As the court of appeals properly stated (Pet. App. 10), if Section 10(e) of the Administrative Procedure Act constitutes the Tax Court a "reviewing court," it "would be meaningless," for the Tax Court has no record to review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 1959.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) [As amended by Sec. 1, Public Salary Tax Act of 1939, c. 59, 53 Stat. 574 and by Sec. 111(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(3) *Gifts, bequests, devises, and inheritances.*—The value of property acquired by gift, bequest, devise, or inheritance. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 22)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [as amended by Sec. 121(a), Revenue Act of 1942, *supra*] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *.

* * * * *

(2) *Non-trade or non-business expenses.*—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

* * * * *

(26 U.S.C. 1952 ed., Sec. 23)

Rev. Rul. 54–80, 1954–1 Cum. Bull. 11:

Advice is requested whether that part of the political contributions received by a political organization or an individual seeking political office which is diverted to the personal use of the candidate or other individual constitutes taxable income to such candidate or other individual.

Contributions to political organizations are customarily made with the intent and understanding that they be used for the expenses of a political campaign or for some similar purpose. Such contributions are not deductible for Federal income tax purposes by the donor. See I.T. 3276, C.B. 1939–1 (Part 1), 108.

Where a political gift is received by an individual or a political organization and it is held or used for the purposes intended, i.e., for present or future expenses of a political cam-

paign or for some similar purpose, it is not taxable income to the recipient. See I.T. 3276, *supra*. However, any amount diverted from the channel of campaign activities and used by a candidate or other individual for personal use constitutes taxable income to such candidate or other individual for the year in which the funds are so diverted. For example, a candidate seeking political office receives contributions totaling $1,000 from individuals and organizations for use in his campaign for election to such office. During the campaign the candidate expends $600 of the contributed funds for campaign purposes. He uses the balance of the campaign funds to reduce the mortgage on his personal residence. In such a case the candidate will be required to include in his taxable income the $400 which represents the portion of the fund which he diverted to his personal use. Such amount will be includible in taxable income in the year in which so diverted.

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Supreme Court of the United States

October Term, 1959

No. 220

WILLIAM O'DWYER and SLOAN O'DWYER,
Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

We are suprised to find in a brief signed by the Solicitor General a statement representing to the Court that Petitioners' First Question Presented, namely, *whether a gift* made as a campaign contribution *may be taxed as income*, was "first argued in the Court of Appeals" (Br. Opp. 11).

We quote from the petitioners' reply brief below, in the Court of Appeals, page 1:

> "We are surprised at the Government's statement that 'he did not choose to argue that, even if received, such payment did not constitute taxable income' (br. 16) and 'neither in his briefs nor elsewhere in the Tax Court did he attempt to argue that issue' (br. 37).
>
> "The petitioners' brief in the Tax Court, however, contained the following (p. 35, Tax Court Brief for Petitioners):
>
> > 'Crane said that he made a contribution to the petitioner's political campaign. Such contributions, the Department has ruled, to be not taxable to the candidate and that has been the usual and regular practice of the Department.

> We venture to say that this case is unique in its attempt to treat a contribution to a political campaign as taxable income to the candidate.'
>
> "The Tax Court was certainly sufficiently troubled by the argument to recognize the issue, consider it, and decide it. The question is necessarily before this Court for review.'"

The Court of Appeals, likewise, considered, reviewed, and discussed in its opinion this serious and major question (Pet. 49-52) and did not even refer to the inaccurate claim that the issue was first raised in that Court.

The question of taxability of a political gift as income having been considered by *both* lower courts, and decided in a manner incompatible with past decisions of this Court and pertinent legislation, merits review by this Court.

The Government's brief in opposition is misleading, if not deceptive, in its formulation of the issues at the outset of its Argument commencing at page 9. The Government attempts to create the impression that the taxpayers in their petition for certiorari have raised an issue of fact. This is contrary to the fact. The Government's brief makes reference to Petitioners' Statement of the Case and suggests to this Court that taxpayer "attacks the finding of the Tax Court." The petitioners' proposed question Presented belies this statement, and the principal argument set forth under "Reasons Relied on for Allowance of the Writ" is pitched solely to the proposition:

> "Even if Crane gave a campaign contribution to petitioner, such gift did not constitute receipt of taxable income." (Pet. 11)

The case presents significant and troublesome questions as to the scope of taxing power with respect to political gifts, and as to the fairness of procedure in the Tax Court, where the Government enters as a litigant with secret evidence amassed by exercise of a vast panoply of investigative powers, and the taxpayer, against whom there is a "presumption of correctness," enters with no pre-trial discovery techniques available.

There is also presented the serious question, not hitherto considered by this Court, as to the effect of the Administrative Procedure Act on the Tax Court *as a court*.[1]

The brief in opposition has not been candid nor fair in meeting the issue whether the true questions presented by this record should be reviewed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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HOWARD N. MEYER,
Attorneys for Petitioners.

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[1] The Government blandly states that the Tax Court is not a "reviewing court" (Br. Opp. 18) without so much as a word to explain the express statement in page 10 of the Attorney General's Manual that *it is a court* under the Act.